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IN THE

Supreme Court of the United States

October Term, 1970

NO. 1468

STEVE SCOTT and
CINNE ARTS THEATRE, INC., *Petitioners*

v.

THE STATE OF TEXAS, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF TEXAS

MEL S. FRIEDMAN
MALEY AND FRIEDMAN
Houston Bar Center Building
723 Main Street
Suite 410
Houston, Texas 77002

STANLEY FLEISHMAN
6922 Hollywood Boulevard
Suite 718
Hollywood, California 90028

Counsel for Petitioners

March, 1971

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF TEXAS

Petitioners pray that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of the State of Texas rendered in these proceedings on November 11, 1970, such opinion and judgment not being final until December 16, 1970.

OPINIONS BELOW

Petitioners, Steve Scott and Cinne Arts Theatre, Inc., were named as defendants in an action by the State of Texas for injunctive relief against the Cinne Arts Theatre, Inc., and its manager, Steve Scott, which began on January 20, 1970. The suit grew out of the showing by

the defendants of seven movies alleged to be obscene, and was filed under the provisions of Vernon's Ann. P.C. art. 527, as amended, Section 13, such article being a part of the State of Texas' Penal Code. The relief sought by the State of Texas was, (1) a temporary restraining order directing that the pictures not be altered in any way or be removed from the County, but be presented to the Judge for viewing; (2) a temporary injunction; and (3) a permanent injunction against exhibiting obscene matter or possessing such matter for exhibition. On the same date, His Honor, Temple Driver, Judge of the 89th District Court of Wichita County, Texas, entered an order setting a hearing on the State's Petition for Temporary Injunction for January 22, 1970, at 9:00 o'clock A.M., and directing that the motion pictures not be altered nor removed from the County and be produced for viewing by the Judge. In addition, a *subpoena duces tecum* was issued for Steve Scott, directing him to appear at 9:00 o'clock A.M. on January 22, 1970, and to bring the motion picture films with him, together with a projector suitable for showing them. On February 9, 1970, a hearing was held on the State's Application for Temporary Injunction and on the Petitioners' Motion to Dismiss and to Declare the Texas Obscenity Statute, article 527 of Vernon's Ann. P.C. unconstitutional. These proceedings were held before the Honorable Judge Temple Driver on February 9, 1970, such proceedings being unreported, and the Honorable Judge Driver entered a judgment on that date which held that the Plaintiff's, (State of Texas), Application for Temporary Injunction should be denied, that the said statute in question was unconstitutional, and that the State of Texas, by and through its law enforcement agencies in Wichita County, Texas, and in and all

sub-divisions thereof, are permanently enjoined from any further law enforcement of article 527, as amended, of the Texas Penal Code, and that plaintiff's lawsuit be dismissed with prejudice. The plaintiff then and there in open court excepted respectively and gave notice of appeal to the Supreme Court of the State of Texas. Judge Driver's judgment was supported by his Finding of Facts and Conclusions of Law which are attached hereto.

On March 27, 1970, the State of Texas, as Appellant, filed its brief in the Supreme Court of Texas on direct appeal from the 89th Judicial District Court, Wichita County, Texas, and on May 13, 1970, Steve Scott and Cinne Arts Theatre, Inc., filed their brief as Appellee in said case, such cause number being number B-2006. On November 11, 1970, the Supreme Court of Texas rendered an opinion which reversed the Trial Court's decision, dissolved the injunction against the State, reinstated the State's suit on the docket of the trial court and directed the trial court to proceed to trial of such suit in accordance with the Supreme Court of Texas' opinion, and, at the same time, declaring that Sections (1)f and 13 of Vernon's Ann. P.C. article 527, as amended, are constitutional. On November 27, 1970, the Petitioners herein filed a Motion for Rehearing, well within the time period for the filing of such motion, and this Motion was subsequently over-ruled on December 16, 1970, which had the force and effect of making the judgment and opinion of the Supreme Court of Texas final at this point. The judgment and opinion of the Supreme Court of Texas, as such relates to the Petitioners herein, is as yet unreported. On December 28, 1970, the Petitioners herein filed a Motion to Stay Mandate and Notice of Appeal with the Clerk of the Supreme Court of Texas, and the

Motion to Stay Mandate was over-ruled on December 31, 1970.

A copy of the judgment entered on February 9, 1970, by the Honorable Judge Temple Driver is annexed hereto as Appendix "A". A copy of the Honorable Judge Temple Driver's Findings of Facts and Conclusions of Law is annexed hereto as Appendix "B". The sections of article 527 of Vernon's Ann. P.C. article 527, as amended, that were declared by the Honorable Judge Temple Driver to be unconstitutional and void, is annexed hereto as Appendix "C". A copy of the Supreme Court of Texas' opinion and judgment rendered herein is annexed hereto as Appendix "D". A copy of the notice that the motion for rehearing filed on the Petitioners' behalf in the Supreme Court of the State of Texas was over-ruled on December 16, 1970, is annexed hereto as Appendix "E".

JURISDICTION

The order or judgment of the Supreme Court of the State of Texas was entered on November 11, 1970, but did not become final until December 16, 1970. See Appendices "D" and "E", *infra*. This Petition for Certiorari was filed less than ninety days from the date aforesaid, such date being that of December 16, 1970, when the order or judgment rendered in the Supreme Court of the State of Texas became final. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3). This is the first case that the Petitioners herein have knowledge of in which the respective parties have completely exhausted all of the available state remedies in the areas of the First Amendment freedoms protected by the United States Constitution, with the legality of a state statute in question as such question relates to the issues that deal with al-

legedly obscene press materials and the constiutionality of that state statute dealing with the distribution or exhibition of the allegedly obscene press materials.

QUESTIONS PRESENTED

The State of Texas instituted civil action under the procedures outlined in a criminal statute in order to enforce the provisions of the criminal statute and the Supreme Court of the State of Texas used procedural methods to by-pass federal constitutional questions involved in the enforcement of the statute. The questions thereby arising are:

1. Whether a state court can render a judgment by the use of state procedural rules and allege that defaults in compliance with the state procedural rules can preclude the state court from considering a federal question thereby avoiding the important federal questions involved in the enforcement of a statute or does such action by a state court amount in itself to a federal question.

2. Whether Vernon's Ann. P.C. article 527, as amended, is unconstitutionally overbroad because it fails to differentiate between public and mere private possession of allegedly obscene materials, thus causing a prior restraint on First Amendment freedoms.

3. Whether Vernon's Ann. P.C. article 527, as amended, is, as written, void for vagueness and impermissible overbreadth in the area of First Amendment freedoms because the said provision is susceptible of sweeping and improper application by law enforcement officials and has a chilling and inhibiting effect on the exercise of the federal constitutional rights of citizens of the State of Texas and of the United States to dis-

seminate and receive First Amendment materials in that there are no standards for guidelines set forth in the statute which due process demands to assure non-obscene materials the constitutional protection to which they are entitled for citizens to possess, distribute, acquire, sell, receive and/or purchase First Amendment materials and are thereby repugnant to the free speech and press and due process provisions of the First, Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States.

A. Vernon's Ann.P.C. article 527, as amended, is unconstitutional in that it imposes strict liability in the guilty knowledge element without requiring that the defendant know the material to be obscene and that he intends to violate the law.

B. Vernon's Ann.P.C. article 527, as amended, is unconstitutional in that it fails to define proper procedural safeguards to protect freedom of speech and press pursuant to the First, Fourth, Fifth, and Fourteenth Amendments of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and the provisions of Vernon's Ann.P.C. Article 527, as amended, are set forth in Appendix "F" hereto.

STATEMENT OF THE CASE

This case arose out of an attempted lawsuit to enjoin the exhibition of alleged obscene press materials and seek a judgment of obstruction thereof. The lawsuit was brought

under Section 13 of Article 527, as amended, of Vernon's Ann.P.C. for the State of Texas.

The State of Texas, by and through its County Attorney for Wichita County, filed a lawsuit alleging that Steve Scott was the manager of the Cinne Arts Theatre, Inc., a motion picture theatre, located in Wichita Falls, Texas. The Cinne Arts Theatre is an enclosed theatre, small in size, for adults only, and there is no advertising or pandering in such a way as to offend the sensibilities of the general public, and no juveniles allowed; further, the Cinne Arts Theatre exhibits motion picture films relating to sexual matters, but all patrons are consenting adults, who desire to see and view such films. There is no offensive advertising to the street or the public; and all adults are forewarned and given adequate notice of the nature of the motion picture films being exhibited inside. It is then a matter of freedom of choice of the adult citizens to decide for themselves that they desire to go inside this movie theatre and see the motion picture films. The lawsuit was filed by the County Attorney on January 20, 1970, at which time an ex parte temporary restraining order was issued by the Honorable Judge Temple Driver, presiding judge of the 89th Judicial District Court of Wichita County, Texas. The temporary injunction hearing was set for trial for January 22, 1970, at 9:00 o'clock A.M. The lawsuit and the prayers for injunction were in regard to the plaintiff, claiming that the Petitioners herein were a "public nuisance" and should be abated by injunction. The Petitioners herein filed numerous motions in the injunction proceedings, including a motion to dismiss and a motion to declare the Texas Obscenity Statute, article 527 of Vernon's Ann.P.C. unconstitutional and void. Then, on February 9, 1970, a hearing was held

on the State's Application for a Temporary Injunction and on Defendants' Motion to Dismiss and Declare the Texas Obscenity Statute, Article 527 of the Texas Penal Code, unconstitutional. The Honorable Judge Driver entered a judgment on that date which denied the Plaintiffs' application for temporary injunction and declared certain sections of article 527 of the Texas Penal Code unconstitutional and issued Findings of Facts and Conclusions of Law which stated the reasons that he entered the judgment as set out in summary hereinabove. The Honorable Judge Temple Driver also granted injunction against the State of Texas, acting by and through its law enforcement agencies in Wichita County, so to prevent unlawful police activity from the enforcement of an unconstitutional state statute, requested by the Petitioners herein. On March 27, 1970, the State of Texas, as Appellant, filed its brief in the Supreme Court of Texas on direct appeal from the 89th Judicial District Court, Wichita County, Texas, and on May 13, 1970, Steve Scott and Cinne Arts Theatre, Inc., filed their brief as Appellees in the said case, such case number being No. B-2006. In addition to the aforementioned proceedings that took place on November 11, 1970, and November 27, 1970, and December 16, 1970, there were other proceedings, those being the Respondents' Motion to Stay Mandate and Notice of Appeal which was filed with the Clerk of the Supreme Court of Texas, on December 28, 1970, and the Motion to Stay Mandate was over-ruled on December 31, 1970.

HOW FEDERAL QUESTIONS ARE PRESENTED

On behalf of the Petitioners, the following affirmative defenses were raised by pleadings in the District Court

for Wichita County; a) That the Texas Statute under which the action was commenced was unconstitutionally vague and overbroad; b) That the Texas Obscenity Statute, Vernon's Ann. P.C. article 527, as amended, under which the action was commenced was unconstitutional and void; c) That Section 3, of Vernon's Ann. P.C. article 527, as amended, is unconstitutional in that it is overbroad, and fails to differentiate between public and mere private distribution, and fails further to differentiate between public and mere private possession of alleged obscene materials; d) That Section 1-E of Vernon's Ann. P.C. article 527, as amended, is unconstitutionally overbroad in that in its definition of "distribute" it also fails to differentiate between public and mere private distribution; e) That Section 9 of Vernon's Ann. P.C., article 527, as amended, is unconstitutional in that it specifically sets forth an ex parte search warrant provision in violation of numerous cases that require a prior-adversary-determination of the obscene nature of the press materials involved, before any search, seizure, arrest or any other criminal process can be instituted against press materials; f) That Section 1, Sub-section f, of Vernon's Ann. P.C., article 527, as amended, is unconstitutionally vague and overbroad in setting forth the constitutionally required scienter element of knowledge by constructively imposing knowledge through a use of vague and indefinite terms so as to amount to absolute strict liability which imposes a prior restraint on freedom of speech and violates the constitutional protections of the First Amendment to the United States Constitution; g) That Section 13, of Vernon's Ann. P.C., article 527, as amended, is unconstitutional in that it fails to define proper procedural safeguards to protect freedoms of speech and press of the

First Amendment to the United States Constitution when the state seeks to restrain freedom of press by the use of the injunction remedy set out in Section 13 of Vernon's Ann. P.C., article 527, as amended, in that the said section fails to set forth proper procedural guidelines in order that freedom of the press would not suffer unconstitutional suppression under this section of the said statute. These defenses were accepted by the Honorable Judge Temple Driver as noted in his Findings of Fact and Conclusions of Law and the Order entered therein. A timely notice of appeal to the Supreme Court of the State of Texas was entered from the judgment and injunction entered in the District Court for Wichita County, Texas, and the record of all pleadings and the lower court opinion and judgment was filed in the proceedings. The Supreme Court of Texas reported out in a written opinion finding that certain sections of the statute in question were, in fact, constitutional and that the alleged failure of the respondents in the Supreme Court of Texas, Petitioners herein, to conform to state civil procedure in the district court left no alternative but to reverse the district court's decision. This decision, as noted in the annexed Appendix "D" presented the federal question, one of the questions presented in this Petition for Writ of Certiorari, of when and how defaults in compliance with state procedural rules can preclude a state court's consideration of a federal question which is in itself a federal question.

REASONS FOR GRANTING THE WRIT

1. A substantial federal question is raised when one of the issues presented is whether a state court can render a judgment by the use of state procedural rules and allege that defaults in compliance with the said state procedural

rules can preclude the state court from considering those federal questions presented, thus allowing the highest state court in the state to avoid the important federal questions involved in the enforcement and application of a state statute.

This Court has a duty to review the Petitioner's claim herein when there is an allegation that the highest state court of a state rendered a judgment on insupportable state grounds based upon alleged defects in procedural rules and such judgment effectively fails to answer substantial federal questions presented to that court. The question basically presented is whether or not the question of state law is independent of federal questions and is the decision reached upon that point sufficiently well founded to furnish adequate support for the judgment? *See, Postal Telegraph Cable Co. v. City of Newport, Ky.*, 247 U.S. 464, 476 (1918), 38 S.Ct. 566. When the rights to be protected are federal rights, and are set up and claimed as such in pleadings or briefs, then the question of whether such rights were denied, or not given due recognition, by the Supreme Court of the State of Texas, is a question as to which the Petitioners herein are entitled to invoke the judgment of this Court, thus, it is within this Court's province to inquire not only whether the rights were denied in express terms, but also whether they were denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support. *See, Ward v. Board of County Com'rs.*, 253 U.S. 17, 22 (1920), 40 S.Ct. 419. The Constitution of the United States, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action

is properly invoked. Even though the claimed constitutional protection be denied on non-federal grounds, it is the province of the Supreme Court of the United States to inquire whether the decision of the state court rests upon a fair or substantial basis. Whether a petitioner's constitutional rights are denied by either the refusal of the state court to decide the question or by an erroneous decision of said state court, the petitioners may invoke the jurisdiction, in either case, of the Supreme Court of the United States to decide the question. *See, Lawrence v. State Tax Commission of State of Mississippi,* 286 U.S. 276, 282 (1932), 52 S.Ct. 556. Thus, if the non-federal ground relied upon by the state court is without any fair or substantial support, it thus becomes the duty of the Supreme Court to ascertain, in order that constitutional guarantees may appropriately be enforced, whether the asserted non-federal ground independently and adequately supports the judgment. *See, National Association for the Advancement of Colored People v. State of Alabama,* 357 U.S. 449, 455 (1958), 78 S.Ct. 1163. Also, when referring to the familiar principle that the Supreme Court will decline to review state court judgments which rest on independent and adequate state grounds, even where these judgments also decide federal questions, it must be recognized that this principle applies not only in cases involving state substantive grounds but also in cases involving state procedural grounds, but it is important to distinguish between state substantive grounds and state procedural grounds. Where the ground involved is substantive, the determination of the federal question cannot affect the disposition if the state court decision on the state law question is allowed to stand. Thus, the adequate non-federal ground doctrine is used to avoid advisory opinions. This doctrine can have no application where

the state ground is purely procedural. A procedural default which is held to bar challenge to a judgment in state courts, even on federal constitutional grounds, prevents implementation of the federal right. Accordingly, this court has consistently held that:

> "* * * the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question. cf. Lovell v. City of Griffin, 303 U.S. 444, 450, 58 S.Ct. 666, 668, 82 L.Ed. 949. As Mr. Justice Holmes said:
>
> 'When as here there is a plain assertion of federal rights in the lower court, local rules as to how far it shall be reviewed on appeal do not necessarily prevail. * * * Whether the right was denied or not given due recognition by the [state court] * * * is a question as to which the plaintiffs are entitled to invoke our judgment.' Love v. Griffin, 266 U.S. 32, 33-34, 45 S.Ct. 12, 69 L.Ed. 157.
>
> Only last term, we re-affirmed this principle, holding that a state appellate court's refusal, on the ground of mootness, to consider a federal claim, did not preclude our independent determination of the question of mootness; that is itself a question of federal law which this court must ultimately decide. Liner v. Jafco, Inc., 375 U.S. 301, 84 S.Ct. 391, 11 L.Ed.2d 347. These cases settle the proposition that a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the state's insistence on compliance with his procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest. If it does not, the state procedural right ought not be permitted to bar vindication of important federal rights."

Henry v. State of Mississippi, 379 U.S. 443, 447-448 (1965), 85 S.Ct. 564. Thus, this Court should note probable jurisdiction in this case because of the severe federal questions involved and the decision of the Texas Supreme Court to by-pass the severe federal questions presented on procedural grounds.

2. Vernon's Ann. P.C., article 527, as amended, is unconstitutionally overbroad because it fails to differentiate between public and mere private possession of allegedly obscene materials, thus causing a prior restraint on First Amendment freedoms.

In *Stanley v. Georgia,* 394 U.S. 557, 89 S.Ct. 1243 (1969), the United States Supreme Court appears to have rejected or significantly modified the proposition stated in *Roth v. United States,* 354 U.S. 476, 77 S.Ct. 1304 (1957), that obscenity is not within the area of constitutionally protected speech or press. It was urged in *Roth* that the obscenity statutes offended the constitutional guarantees because they purported to punish incitation of sexual thoughts; it was argued that constitutional guarantees were violated without proof that obscene materials would create a clear and present danger of anti-social conduct or induce its recipients to such conduct. All of these arguments were rejected "in light of our holding that obscenity is not protected speech", *Roth,* 354 U.S. at 486.

In *Stanley,* the United States Supreme Court specifically held that the First and Fourteenth Amendments protect mere private possession of obscene press materials. Thus, inherent in the right to possess is the right to receive. Said the Court in *Stanley*:

> "[3, 4] It is now well established that the Constitution protects the right to receive information and ideas. 'This freedom [of speech and press] * * * necessarily protects the right to receive * * *'. Martin v. City of Struthers, 319 U.S. 141, 143, 63 S.Ct. 862, 863, 87 L.Ed. 1313 (1943); see Griswold v. Connecticut, 381 U.S. 479, 482, 85 S.Ct. 1678, 1680, 14 L.Ed.2d 510 (1965); Lamont v. Postmaster General, 381 U.S. 301, 307-308, 85 S.Ct. 1493, 1496-1497, 14 L.Ed.2d 398 (1965) (Brennan, J., concurring); cf. Pierce v. Society of the Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). This right to receive information and ideas, regardless of their socialworth, see Winters v. New York, 333 U.S. 507, 510, 68 S.Ct. 665, 667, 92 L.Ed. 840 (1948), is fundamental to our free society."

394 U.S. at 564. It is interesting to note that in *Stanley* particular reliance is placed upon the opinions in *Martin v. City of Struthers,* 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313, and *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, two cases which emphasize the First Amendment right to receive all media of expression. In *Martin,* Mr. Justice Black, speaking for the Court, said:

> "The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believe essential if vigorous enlightenment was ever to triumph over slothful ignorance. *This freedom embraces the right to distribute literature, . . . and necessarily protects the right to receive it.* The privilege may not be withdrawn even if it creates the minor nuisance for a community of cleaning litter from its streets . . . Freedom to distribute

> information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved."

319 U.S. at 143, 146-67 (emphasis added). In *Griswold v. Connecticut,* Mr. Justice Douglas, speaking for the Court, said:

> ". . . The State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. *The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read* . . . and freedom of inquiry, freedom of thought, and freedom to teach . . . indeed the freedom of the entire university community . . . without those peripheral rights the specific rights would be less secure."

381 U.S. at 482, 483 (emphasis added). In *Lamont v. Postmaster General,* quoting Justice Brennan's concurring opinion, 381 U.S. 301, 308 (1965) (which was cited in *Stanley*):

> "The right to receive publication is . . . a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren market place of ideas that had only sellers and no buyers."

The entire opinion and reasoning of the Supreme Court in *Stanley* take on the broader dimension of "mere private possession," and private possession in the privacy of one's home is only one type of "mere private possession." It is

true that the facts of *Stanley* involve a seizure of obscene materials from Stanley's bedroom, but the language of the opinion clearly suggests that States have no business under the First and Fourteenth Amendments of the U. S. Constitution to attempt to regulate the moral contents of a person's thoughts. Said the Supreme Court:

> "Whatever the power of the State to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." * * * ". . . The State may no more prohibit mere possession of obscenity on the ground that it may lead to anti-social conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits." * * * *"Finally we are faced with the argument that the prohibition of possession of obscenity is a necessary incident to statutory schemes prohibiting distribution. . . . we are not convinced that such difficulties exist, but even if they did we do not think that they would justify infringement of the individual's right to read or observe what he pleases."* * * *We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime.* Roth and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home."

394 U.S. at 566-568 (emphasis added). The United States Supreme Court has held mere private possession is constitutionally protected, and has gone on to say that although States have broad power to regulate obscenity, States may not regulate private possession of obscenity

in a home. But it seems clear that private possession in the home is only one form of "mere private possession." Furthermore, by its reliance upon cases involving distribution and receiving of expression, *Martin, Griswold, Lamont,* and others, *Stanley* also stands for the proposition that inherent in the right to possess is also the right to receive. Therefore, it is submitted that private distribution is constitutionally protected.

Furthermore, if private distribution for mere private possession is not constitutionally protected, it would put a very surreptitious burden upon an adult to acquire press materials he has a constitutional right to possess!

Certain examples of "mere private possession and distribution" are:

1) A private home dweller possesses obscene materials and exhibits them to his or her spouse; or exhibits them to his neighbors or friends who may be visiting.
2) A private home dweller lends his obscene materials to his neighbors or his friends, for their viewing in the privacy of their homes.
3) A private home dweller, who has purchased obscene materials, and brought them home, sells one or several of his materials to a neighbor or friend, for their private use. (The sale can be for profit or to simply "break-even").
4) A private home dweller, who has a collection of obscene press materials, gives some or many away to neighbors or friends for their private use.
5) A private home dweller has many friends and neighbors visiting in his home, and exhibits obscene press

materials to them for their private viewing while in his home; and further, he then gives each adult person a copy of the material for their private use in their home. He may even sell it to them.

6) A private bookstore, for adults only, which does not pander, and does not permit juveniles inside, and does not advertise so to offend the sensibilities of the general public, sells obscene materials to a consenting, desiring adult, who buys material to take home for "mere private possession."

7) A private, small, enclosed theatre, exhibits motion pictures to a consenting adult audience; no juveniles allowed; no advertising or pandering that assaults the sensibilities of the general public; only a matter of free choice of the adults themselves. (It could be possible that this exhibition is to a private club of adult persons, who desire to see and view press materials dealing with sexual matters; only members permitted).

Petitioners suggest to the Court that the above examples of distribution are as constitutionally protected as is private possession; to hold otherwise, would be to inhibit and maybe even destroy the constitutionally protected right to privately possess. The present Texas Obscenity Statute is overbroad, and makes all the above distributions criminal on its face, because it defines distribute in Section (1f):

> " 'distribute' means to transfer possession of, whether with or without consideration."

Such overbroad definition purports to make every transfer, whether by gift or otherwise, even between a husband and a wife, criminal. Furthermore, the present Texas Ob-

scenity Statute makes possession with intent to distribute or exhibit also a crime. See Section (3) of the said Statute. Under this Statute a person would be guilty of a crime if he possessed obscene materials in the privacy of his home and intended to show them or exhibit them to his wife, his friends, or possibly other adult neighbors.

A statute which is overbroad on its face causes a prior restraint on First Amendment freedoms, and cannot be construed as constitutional. Petitioners submit that where a statute is unconstitutionally overbroad in the area of First Amendment freedoms, it is a pervasive prior restraint on freedom of expression and should be struck down as unconstitutional. *Lovell v. City of Griffin,* 303 U.S. 444, 58 S.Ct. 666 (1938); *Wieman v. Updegraff,* 344 U.S. 183, 73 S.Ct. 215 (1952); *Smith v. California,* 361 U.S. 147, 80 S.Ct. 215 (1959); *N.A.A.C.P. v. Button,* 371 U.S. 415, 83 S.Ct. 328 (1963); *Baggett v. Bullitt,* 377 U.S. 360, 84 S.Ct. 1316 (1964); *Dombrowski v. Pfister,* 380 U.S. 479, 85 S.Ct. 1116 (1965); *Keyishian v. Board of R ,ents,* 385 U.S. 589, 87 S.Ct. 675 (1967); *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734 (1965); and numerous other cases all holding that where a statute is overbroad and abridges freedom of expression it should be struck down. See, *Smith v. Califarnia,* wherein the Supreme Court stated:

> "Every bookseller would be placed under obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience."
>
> * * * "The bookseller self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered."

361 U.S. at 151-155. In Smith it was recognized that an overbroad statute would cause self-censorship. Petitioners herein submit that mere private possession, mere private distribution, and mere private exhibition are constitutionally protected acts under the First and Fourteenth Amendments to the United States Constitution; yet the face of the Texas Obscenity Statute makes such acts criminal, and such a Statute works a prior restraint on freedoms of expression.

3. Vernon's Ann. P. C. article 527, as amended, is, as written, void for vagueness and impermissible overbreadth in the area of First Amendment freedoms because the said provision is susceptible of sweeping and improper application by law enforcement officials and has chilling and inhibiting effect on the exercise of the federal constitutional rights of citizens of the State of Texas and of the United States to disseminate and receive First Amendment materials in that there are no standards for guidelines set forth in the statute which due process demands to assure non-obscene materials the constitutional protection to which they are entitled for citizens to possess, distribute, acquire, sell, receive and/or purchase First Amendment materials and are thereby repugnant to the free speech and press and due process provisions of the First, Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States.

A. Vernon's Ann. P. C. article 527, as amended, is unconstitutional in that it imposes strict liability in the guilty knowledge element without requiring that the defendant know the material to be obscene and that he intends to violate the law.

B. Vernon's Ann. P. C. article 527, as amended, is unconstitutional in that it fails to define proper procedural safeguards to protect freedom of speech and press pursuant to the First, Fourth, Fifth, and Fourteenth Amendments of the United States Constitution.

The instant lawsuit was filed by the County Attorney of Wichita County, Texas, seeking to abate an alleged public nuisance. The doctrine of public nuisance, speaking in terms of irreparable harm and general welfare of the community, are entirely too vague, uncertain and indefinite to provide a procedural basis upon which to suppress freedoms of speech and press under the First and Fourteenth Amendments of the United States Constitution. An excellent discussion of this problem is presented in *Grove Press, Inc. v. City of Philadelphia,* 418 F.2d 82 (3rd Cir., November 3, 1969), wherein it was held that public nuisance is unconstitutional in the area of First Amendment freedoms. The facts of *Grove Press, Inc.* are similar to the facts in the instant case: In *Grove,* as herein, state authorities sought an injunction to prevent a public nuisance, and thereby enjoin and restrain the exhibition of a motion picture film; it was alleged that the motion picture film and the theater in which it was playing, was a public nuisance. The Court in *Grove Press, Inc.* said:

> "We have concluded that as a standard for regulating First Amendment rights, neither injury to the public, nor unreasonableness, standing alone, is sufficiently narrow or precise to pass constitutional muster. Each is too elastic and amorphous a standard by which to restrain the exercise of free expression. What is encountered with the sprawling doctrine of public nuisance is an attempt to restrict First Amendment

> rights by means analogous to those under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application. Cantwell v. Connecticut, 310 U.S. 296, 308, 60 S.Ct. 900, 905, 84 L.Ed. 1213 (1940).
>
> The common law of public nuisance may be a perfectly valid method by which to implement a state's police power in certain defined circumstances where, for example, it is used to restrain that which is prohibited by other constitutionally appropriate standards. It may not be used, however, both to define the standards of protected speech and to serve as a vehicle for its restraint."

418 F.2d at 88. It was recognized in *Grove Press, Inc.* that public nuisance is just too uncertain and too indefinite to muster the precise standards for restraining free speech and press.

It is interesting to note that the lawsuit herein was brought to restrain a public nuisance, and not for the purpose of stopping a violation of the criminal obscenity law. The very fact that this lawsuit was brought as a public nuisance, is itself a demonstration of the overbreadth and vague standards built into Section 13 of this Statute. This particular Section of the Statute just does not set forth sufficient guidelines to establish its true purpose, and its precise application. The face of this Section 13 is not limited to issuing injunctions for the purpose of stopping the circulation of alleged obscene press materials; as is witnessed herein, it is also used in the area of public nuisance. Such a use is unconstitutional. See *Freedman, supra,* wherein the doctrine was announced that if a state seeks to restrain circulation of press ma-

terials, very careful and safe guidelines must be established so to insure quick decision, and prevent prior restraint of press materials.

Although Section 13 does state "However, no restraining order or injunction shall issue except upon notice to the person sought to be enjoined," there is no guarantee of a prior-adversary-hearing prior to the issuance of any type of restraining order. There must first be a prior-adversary-hearing before any type of censorship of press materials. This doctrine of a prior-adversary-hearing also exists prior to the issuance of any type of injunction or restraining order. It is submitted by Petitioners that a restraining order or injunction, which prohibits the circulation of press materials, is as much a vehicle of censorship as is the actual seizure of the materials. Such restraining orders or injunctions have been expressly forbidden as a prior restraint on freedom of press. See *A Quantity of Copies of Books v. Kansas,* 378 U.S. 205, 84 S.Ct. 1723 (1964), wherein the Supreme Court stated:

> "This is the teaching of Kingsley Books, Inc. v. Brown, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469. See Marcus, 367 U.S. at pp. 734-738, 81 S.Ct. at pp. 1717-1719. The New York injunctive procedure there sustained does not afford *ex parte* relief but postpones all injunctive relief until 'both sides have had an opportunity to be heard.' Tenney v. Liberty News Distributors, 13 A.D.2d 770, 215 N.Y.S.2d 663, 664."

378 U.S. at 210. The U.S. Supreme Court has stated that in *Kingsley,* they have sustained a statutory procedure which did not afford ex parte injunctive relief, and it is suggested by the above quotation, which is in the case announcing the requirement of a prior-adversary-hearing,

that had *Kingsley* permitted injunctive relief before both sides had an opportunity to be heard in any adversary hearing, the *Kingsley* holding would have been different. It is again suggested that no ex parte restraining orders are constitutional in the area of First Amendment freedoms. See also *Gundlach v. Rauhauser,* 304 F.Supp. 962 (1969); and *Commonwealth v. Guild Theatre, Inc.,* 248 A.2d 45 (Sup. Ct. of Penn., 1968), holding ex parte Restraining Orders to be an unconstitutional prior restraint on freedom of expression.

In being too vague and overbroad, Section 13 permits injunctions for both a public nuisance and obscene materials; but there are different standards of tests to decide whether or not a press material is obscene or whether or not some particular conduct is a public nuisance. Not only the constitutional criteria and standards are different between the two, but also the evidence and weight of evidence is greatly different. Surely in the area of constitutionally protected speech and press, the evidence to be presented to establish the obscenity of press materials is far greater in weight, than would be the evidence presented to establish a probable public nuisance. In the area of public nuisance a mere preponderance of evidence would be sufficient to allow a trial court to issue injunctive relief; in the area of constitutional speech, in attempting to gain an injunction against distribution of alleged obscene press materials, the weight of evidence would be far greater. It would seem that since Section 13 is part of a criminal statute, that the burden of proof would be upon the moving party, and that burden should be "beyond any reasonable doubt." This is further supported by the words in this Section "to carry out and enforce the provisions of this article." Therefore, it must be said

that Section 13 is a vehicle to carry out and enforce a criminal article; and it would seem that the same burden of proof must be present before suppression of press materials is effected by mere injunction remedies. If the standard and burden of proof was not "beyond a reasonable doubt," then a press material which is not obscene under this criminal statute, and therefore constitutionally protected, could still be censored and suppressed by means of the injunction remedy in this Section; the moving party for injunction would just put on a mere preponderance of evidence, and be able to suppress constitutionally protected press materials, which would not be criminally obscene. There is, however, no statement of burden of proof or quantity of proof in Section 13, except that the Section confers general jurisdiction for restraining orders, temporary and permanent injunctions. On the face of this Section, it purports to authorize such injunction remedies upon a mere preponderance of proof. This is unconstitutional.

Although Section 13 does require notice be given prior to the issuance of a restraining order or injunction, it does not require an adversary proceeding, which would then embody all of the principles of due process of law, prior to the issuance of such injunctions. Therefore, under this Section, a restraining order or injunction could issue enjoining and restraining the exhibition of press materials, prior to their having been adjudged obscene, and prior to their having any adversary hearing whatsoever. Notice is nothing more than service of process. This Section does not require that there be both notice and an adversary hearing prior to restraining or injunction orders. This too is unconstitutional.

In Section 13 it seems that the person to be enjoined is entitled to a trial of the issues within one (1) day after joinder of issue, but the uncertainty enters into the procedural vehicle as to how this is accomplished. Does this Section now mean that a defendant is entitled to have the Monday next preceding twenty (20) days after service of citation before filing his answer? Is his answer joinder of issue? Is a defendant entitled to all of the pre-trial discovery devices, as well as sufficient time to prepare his case for trial, so to present evidence establishing the non-obscene nature of his press materials. All of these particular procedural protections of due process of law are not written into the face of the statute. Presuming that those procedural protections are afforded a defendant, the next question is: Can a Court issue a temporary injunction or restraining order prior to the final trial on the obscenity of the press materials involved? It would seem that the face of this Statute permits the issuance of a restraining order or injunction prior to such trial, and therefore permits censorship and prior restraint on press materials before they are actually adjudged to be obscene.

Section 13 presents other constitutional problems in the area of forced self-incrimination, in violation of the Fifth and Fourteenth Amendments to the United States Constitution. A defendant who is sued under Section 13 is brought into State Court on a civil suit that is quasi-criminal in nature. This Defendant is then subjected to problems concerning his right not to be required to incriminate himself. It would seem that unless immunity is granted in each Section 13 suit, a defendant would not be free under Article 527 to really litigate the obscene nature of the press materials, especially in view of the strict liability clause in the knowledge section of this statute.

In the area of obscenity, and with the three-fold test for judging the obscene nature of press materials, it would seem that vagueness is an ever present burden upon a defendant, who doesn't know whether or not a press material is or is not obscene. A civil remedy would be an excellent method for adjudication as to the obscene nature of press materials; but under Section 13, and the entire Article 527, a defendant is not free to adjudicate the question of obscenity with a criminal prosecution hanging over his head. The State of Texas should not be permitted to gain evidence for criminal prosecution via a civil injunction remedy. See *Boyd v. United States,* 116 U.S. 616; *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania,* 380 U.S. 702; and *United States v. Detroit Vital Food, Inc.,* 407 F.2d 570 (Sixth Cir., 1969), *cert. granted* 89 S.Ct. 1998. These cases hold that civil litigation cannot be used to discover or gain evidence for criminal prosecution. Such a procedure is unconstitutional in violation of the Fourth and Fifth Amendments to the United States Constitution. Section 13 of the instant Statute provides a method for circumventing the Fourth and Fifth Amendments and is unconstitutional.

Petitioners state to this Honorable Court that the last sentence of Article 527, Section 13 is unconstitutional in total on its face. It mandates and orders the Court which issues a final judgment of injunction to order the Sheriff of the County to seize and destroy the press material. In view of *Stanley, supra,* and the other cases cited above, mere private possession of obscene press materials is constitutionally protected. Therefore, even if an injunction issued which prohibited public distribution of obscene press materials, no governmental authority

would have the authority or power to destroy such materials; those press materials could simply be used in "mere private possession." No governmental authority has the power to destroy property that a citizen has the right to possess. Section 13 on its face is unconstitutional.

There exists numerous other procedural difficulties with Section 13 of this Statute:

(a) Since the tests for obscenity concerns the appeal to the prurient interest of the average adult, shouldn't a Defendant be permitted a jury trial, of average adults, to decide the question of prurient appeal? It would seem that this right to jury trial would exist prior to any injunction order, and therefore a temporary injunction issued by a hearing, which is not a full evidentiary hearing with all of the above procedural safeguards, is totally deficient to suppress and censor freedom of expression.

(b) There are no procedural guidelines established telling state authorities whether to proceed under Section 13 on the theory of public nuisance or to confine their lawsuit to a question of the obscene nature of the material itself. It would seem that even if press materials were in fact obscene that there would be great difficulty in showing a public nuisance and establishing the vague and uncertain criteria for public nuisance. Furthermore, in view of *Stanley,* and the protection to "mere private possession," even if such materials were obscene they would still be constitutionally protected for private distribution.

(c) If the State of Texas filed an application for injunction, as was done in the District Court below, isn't it true that a Defendant would be entitled to have his Motion for Special Exceptions granted, and the State have to plead specifically and factually

1) what a prurient interest is; 2) what a shameful morbid interest in sex is; 3) in what manner and in what method a press material appeals to such a prurient interest; 4) what are contemporary community standards; 5) in what specific manner and method the particular press material involved violates those community standards; 6) what are redeeming social values; 7) what particular portions of the press material have redeeming social values and what portions do not have redeeming social values, etc.; and a host of other vague and indefinite conclusions of law which were pled in Plaintiff's pleading below?

(d) What is the burden of proof of the moving party as to each and every element of the test for obscenity?

(e) Can temporary injunctions be issued in spite of the fact that only a modicum of evidence is presented establishing a possible or probable result?

(f) Can a temporary restraining order be granted either ex parte or with notice, but without an adversary hearing? It would seem that Section 13 permits a temporary restraining order with notice, but does not also guarantee a prior-adversary-hearing.

Section 13, of Article 527 is unconstitutional in that it fails to provide proper procedural guidelines to prevent the suppression and censorship of freedom of press.

It is submitted that the constitutional guilty knowledge element in obscenity cases is a two-fold test: first, the defendant must know that the materials is in fact obscene; and second, that he intends to violate the obscenity laws, as for example a public distribution of a material he knows is obscene. The Texas Statute does not require any knowledge of the obscene nature of the material, but

only requires knowledge of the contents of such material, and then imposes constructive knowledge, effecting strict liability in the knowledge element of this crime. Such a statute is unconstitutional.

It is constitutionally required that the criminal element of scienter, guilty knowledge, be present in any prosecution involving press materials, which are claimed by the State or prosecuting authority to be obscene. *Smith, supra.* Therefore, the Texas Legislature, in passing the present Texas Obscenity Law, included in it the scienter element, and the statute reads as follows:

> "Sec. 3. Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares for distribution, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."
>
> "Sec. 1-F. " 'Knowingly' means having actual or constructive knowledge of the subject matter. A person shall be deemed to have constructive knowledge of the contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material." (Chapter 468, 61st Legislature-Regular Session)

The above-quoted sections of the Texas Obscenity Law specifically set out that to have a crime in the area of obscenity the specific obscene material must be "knowingly" distributed, etc. "Knowingly," as set forth above, means "actual" knowledge or "constructive knowledge": either actual knowledge of the subject matter of the press materials support the knowledge element for conviction;

or a constructive knowledge of the subject matter of the press materials would likewise support the knowledge element for conviction. The Court should further note that the face of the statute sets forth that a defendant need not have actual or constructive knowledge that the press materials involved are in fact obscene, but only that he must have actual or constructive knowledge of the "subject matter" of the press materials; obviously this then means that even though a defendant truly believes the materials to be not obscene, so long as he is familiar with the subject matter, by actual or constructive knowledge, or by common law negligence, under this statute, such knowledge would be sufficient to support the element of scienter, a guilty intent. Such knowledge requirement is constitutionally deficient!

Under Section 1-F the statute imposes upon a defendant constructive knowledge of the subject matter of the press materials involved, if the press materials involved are of "suspect nature"; again the Court should note that the statute is not referring to "suspect nature" that the press materials are in fact obscene, but only that the defendant have notice as to the "suspect nature" of the "subject matter" of the materials involved. The Texas Legislature has totally left out the requirement of a guilty intent, and has saddled a defendant, dealing in press materials of nudity and sex, with absolute and strict criminal liability, if he merely has notice of the subject matter of the materials to be of "suspect nature" (whatever that is?).

The above set out portions of the Texas Obscenity Law has totally failed to require guilty knowledge that the materials involved are obscene, and the defendant knew such materials to be obscene, and further that the de-

fendant intended to distribute and circulate obscene materials.

The above and foregoing portions of the Texas Obscenity Law are vague, indefinite, uncertain, and provide absolutely no standard by which a court, jury or defendant, could adjudge the guilty intent of any person dealing in press materials in an obscenity prosecution. In the Texas Obscenity Law, the vice of vagueness and overbreadth are an omnipotent chilling effect on freedom of press, as that statute relates to the scienter element in any obscenity prosecution; the term "suspect nature" is utterly without empirical application and guide lines to aid an interested bookdealer, a prosecuting attorney, or a judge sitting on the bench in an obscenity prosecution. The above portions of the Texas statute and the vice of vagueness creates absolute and strict liability, in violation of the United States Supreme Court in *Smith, supra,* wherein the Supreme Court stated:

> "But our holding in Roth does not recognize any state power to restrict the dissemination of books which are not obscene; and we think this ordinance's strict liability feature would tend seriously to have that effect, by penalizing book sellers, even though they had not the slightest notice of the character of the books they sold."
>
> . . . .
>
> "Every book seller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience."

361 U.S. at 152-153. A vague and indefinite term, such as "suspect nature" that imposes upon a press dealer

constructive knowledge, for the purposes of a scienter element, is a type of strict and absolute criminal liability which would cause prior restraint on free and protected press materials, in that the interested press dealer would fear dealing in press materials that involved sex and nudity, because he would be held absolutely to the knowledge element in an obscenity prosecution.

Where then does this leave the interested person dealing in press materials of sexual matters? Such a person would be put to the task of absolute and strict liability, for he would be put to the choice of either discontinuing to deal in press materials involving nudity and sex, or he would risk that if the material was in fact obscene it was absolutely and strictly of "suspect nature." No doubt because obscenity itself deals with nudity and sex, every single press material ever published revealing nudity and sex would be of "suspect nature"; therefore, in a trial on an obscenity prosecution, once the State could establish the obscenity of the press materials involved, it would follow by absolute and strict liability that the knowledge element would automatically attach against the defendant. As was recognized in *Smith, supra,* a State's application of absolute and strict criminal liability on the scienter element would cause a very serious restriction and suppression of freedom of expression. Said the United States Supreme Court:

> "It has been stated here that the usual doctrines as to the separability of constitutional and unconstitutional applications of statutes may not apply where their effect is to leave standing a statute patently capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression in the expense and inconvenience of crim-

> inal prosecution. . . . And this court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser. . . . By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the book seller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. . . . *The book sellers' self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered.* Through it, the distribution of all books, both obscene and not obscene, would be impeded. . . . It is plain to us that the ordinance in question, though aimed at obscene matter, has such a tendency to inhibit constitutionally protected expression that it cannot stand under the Constitution."

361 U.S. at 151-155 (Emphasis added). What the Supreme Court was stating was simply that absolute and strict liability imposed by a state criminal statute on the scienter element would cause the interested press dealer himself to be a self-made censor, out of simple fear of prosecution. Petitioners submit that the Texas Statute is even more encompassing because of the constructive imposition of knowledge by the term "suspect nature," a vague and indefinite term, and a press dealer would be at the mercy of any obscenity prosecution; since such prosecution would always and in every case involve press ma-

terials dealing in nudity and sex. By the use of a vague and indefinite term, and the imposition of constructive knowledge, the Texas Statute, therefore, is certainly no better than the strict liability ordinance which was struck down in the *Smith* case, and the Texas Statute violates the doctrines of vagueness and overbreadth.

In demonstrating to this Honorable Court the fact that the Texas Obscenity Law is unconstitutionally vague, and unconstitutionally imposes strict and absolute criminal liability in the area of the scienter element, the court need only ask itself the following questions:

(A) What is "suspect nature"?

(B) Does "suspect nature" involve every publication dealing with nudity and sex? If so, would every press material heretofore held not obscene by the United States Supreme Court's standards be of "suspect nature"?

(C) How and in what way should an interested press material dealer know what "suspect nature" is, and how will he differentiate what is of "suspect nature" from what has been held not obscene by the United States Supreme Court?

(D) Even if an interested press material dealer made a truly, sincere effort to sell press materials that are not of "suspect nature," how could he do so without totally discontinuing selling press materials that deal with nudity and sex, when such materials have been held not obscene by the United States Supreme Court.

The above set out sections of the Texas Obscenity Statute contain within it an unconstitutional, illogical, and irrational presumption of law, namely, that if a person has notice as to the "suspect nature" of the press materials

involved, he is presumed by imposition of constructive knowledge, to know the subject matter, and thereby know the material is obscene. It is an irrational conclusion to imagine that merely because one knows that the subject matter of press materials deals with nudity and sex, that it legally follows he knows the material to be obscene. The irrationality of this legal presumption, which is built into the statute, is more clearly demonstrated in light of the fact that the United States Supreme Court has held press materials which deal with nudity and sex not obscene. Such an irrational and illogical conclusion of the knowledge element of this statute, again causes strict and absolute criminal liability, and further violates the constitutional requirements of the United States Supreme Court that irrational presumptions and conclusions of law violate the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. *Leary v.* U. S., 395 U.S. 6, 89 S.Ct. 1532 (1969); *Tot v. U. S.*, 319 U.S. 463, 63 S.Ct. 1241 (1943).

The Texas Obscenity Statute imposes a constructive knowledge by a test of common tort negligence, wherein it states: ". . . if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material." (Art. 527, Vernon's Ann. P. C., Sec. 1-F). The Texas Statute, in talking of "reasonable and prudent man on notice" is no more than a test of negligence to impose constructive knowledge.

Under the Texas Statute, a person who does not intend to violate the obscenity law, but is merely negligent in not taking notice of the "suspect nature of the material" (whatever that is) would be held criminally liable. Again, this is a similar imposition of absolute and strict criminal liability in violation of *Smith, supra.*

The United States Supreme Court has stated when "the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights—rights which we value most highly and which are essential to the working of a free society". *Speiser v. Randall,* 357 U.S. 513, 78 S.Ct. 1332 (1958). In *Smith, supra,* it was stated:

> "The existence of the State's power to prevent the distribution of obscene matter does not mean that there can be no constitutional barrier to any form of practical exercise of that power".

361 U.S. at 155. "It is . . . vital", stated the United States Supreme Court, "that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest." *Roth v. United States,* 354 U.S. 476, 488.

That questions of guilty knowledge and unlawful purpose are significantly presented in any obscenity prosecution was first noted by the Court in *Roth, supra,* 354 U.S. at 491-492. In *Roth,* it was conceded that the standards promulgated by the Court for judging obscenity were not precise, but it was held that nevertheless such enunciated standards provided reasonably ascertainable standards of guilt because both the federal and state statutes there involved, on their face, and as construed and applied, included as an element of the offense proof of guilty knowledge and intent. However, the constitutional significance of the requirement of scienter was not fully explored in all of its facets until the determination of the Supreme Court in *Smith, supra.*

In striking down the California ordinance which imposed strict or absolute criminal responsibility on those engaged in the publication and dissemination of books and other forms of the printed word, the Supreme Court elaborated the principles and postulates which governed its decision that the action of the State violated the free speech and press and due process provisions of both the First and Fourteenth Amendments.

It was emphasized that the elimination of the scienter requirement would cause a substantial restriction on the freedoms of speech and press; that any procedural device adopted by a State which tends to cause even a self-imposed restriction of free expression must be stricken down; that a statute which is patently capable of many unconstitutional applications threatens those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution; that stricter standards against statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; and that the indiscriminate classification of innocent and guiltless behavior with knowing activity and unlawful purpose were clearly violative of the protective provisions of the Constitution. *Smith, supra,* 361 U.S. at 150-152.

In similar fashion, it is submitted, an obscenity statute which, on its face or as construed and applied, purports to punish an individual for violation of the law, without proof that such individual knew that the material was obscene and specifically intended to appeal to a prurient interest, does violence to the free speech and press provisions of the Constitution.

In *Mishkin v. New York,* 383 U.S. 502, 511, 86 S.Ct. 958 (1966), the Supreme Court stated:

> "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity."

In approving the authoritative interpretation placed upon the New York obscenity statute by the highest court of the State with respect to the "stringent scienter requirement" and the "vital element of scienter", 383 U.S. 502, 507, fn. 5.510, the Supreme Court specifically noted that a parenthetical reference in the Court of Appeals' opinion to "knowledge of the contents of the books" was not to be read as a "modification of this definition of scienter", 383 U.S. at 510, fn. 9.

It is vital, it is submitted, in the formulation of the standards for judging issues of scienter and unlawful intent that the important distinction between knowledge of contents and knowledge of obscenity be made. The question at this point of the discussion is not the quantum of proof necessary to support an obscenity conviction, but rather the standards by which courts and juries are to be guided in making their determination with respect to the proof presented. Such standards must meet the scrupulous demands of the Bill of Rights.

To permit the conviction of an accused in an obscenity prosecution solely on the basis of proof of knowledge of contents is to attempt indirectly to impose the absolute criminal liability which was condemned by this Court in *Smith, supra.* Sex is not synonymous with obscenity, and knowledge of the contents of a writing dealing with sex is not in itself the equivalent of knowledge of the alleged obscenity of the writing.

In short, it is submitted, knowledge of contents does not constitute the definition of "scienter" in obscenity prosecutions, but is only an expression of its minimum requirements. Without clear proof of knowledge of contents, there can be no finding of proof of knowledge of the alleged obscenity of the contents. But knowledge of obscenity and unlawful intent must be the constitutional standard.

The Texas Obscenity Law imposes the knowledge element by the use of constructive knowledge, imposed by common law negligence, and such knowledge requires a much stricter standard of proof before suppressing speech and press materials, and in view of the United States Supreme Court's rejection of a negligence standard for suppression of speech and press, see *Time, Inc. v. Hill,* 385 U.S. 374, 87 S.Ct. 534 (1967), it is clear that the Texas Obscenity Statute is unconstitutional.

A state statutory procedure which authorizes the issuance of a search warrant giving the police unfettered authority to seize any publications which they consider to be obscene is constitutionally deficient for lack of safeguards to prevent suppression of non-obscene publications protected by the Constitution. *Marcus v. Search Warrants of Property,* 367 U.S. 717, 81 S.Ct. 1709, 6 L.Ed.2d 1127.

In *Quantity of Copies of Books v. Kansas,* 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809, the United States Supreme Court went further. In that case, a judicial officer had perused seven specified books prior to the issuance of a search warrant. The books appeared to the judicial officer to be "obscene" as defined under the state statute. A search warrant was issued that authorized the seizure of the specific volumes examined by the judicial

officer, as well as other specified titles. The United States Supreme Court stated:

> "It is our view that since the warrant here authorized the sheriff to seize all copies of the specified titles, and since P-K was not afforded a hearing on the question of the obscenity *even of the seven novels before the warrant issued, the procedure was likewise constitutionally deficient.* . . . We therefore conclude that in not first affording P-K an adversary hearing, the procedure leading to the seizure order was constitutionally deficient."
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> * * *
>
> "It is no answer to say that obscene books are contraband, and that consequently the standards governing searches and seizures of allegedly obscene books should not differ from those applied with respect to narcotics, gambling paraphernalia and other contraband. We rejected that proposition in Marcus."
>
> * * *
>
> "For if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgment of the right of the public in a free society to unobstructed circulation of non-obscene books. Bantam Books v. Sullivan, supra; Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498; Marcus v. Search Warrants, supra; Smith v. California, supra."

378 U.S. at 210-213, 84 S.Ct. at 1725-1727 (Emphasis Added).

In *Poulos v. Rucker*, 288 F.Supp. 305 (U. S. District Court, M.D. Alabama, N.D., July 10, 1968), District Judge Johnson ordered the return of certain books which had been seized by law officers of Montgomery, Alabama.

The books had been seized as incident to an arrest. There the Court held that the seizure of the material was patently illegal because there had not been a prior adversary determination on the obscene nature of the press materials before the seizure occurred.

In *Metzger v. Pearcy,* 393 F.2d 202 (U. S. Court of Appeals, 7th Circuit, April 29, 1968), the United States Court of Appeals had before it an appeal from a preliminary injunction which had been issued by the District Court enjoining certain law officers in Indiana from interfering with the exhibition of a motion picture and directing the return of only a few prints of a film which had been seized without a prior-adversary-hearing. In affirming the judgment granting a preliminary injunction, the Court of Appeals stated:

> "It is without dispute that prior to the seizure of the films, there had been no adversary determination by any court in Indiana on the question of whether the motion picture, 'I, A Woman' is obscene. Plaintiff-appellee claims that seizing the motion picture film prior to an adversary determination on the issue of obscenity is a violation of the First, Fourth, and Fourteenth Amendments to the United States Constitution; and that motion pictures, like books, are protected by the constitutional guaranties of freedom of speech and press."
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> * * *
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> "Defendants-appellants strongly argue that when an officer has reasonable and probable cause to believe that a film is obscene, having viewed its entire public showing, and signs a criminal affidavit charging the appropriate crime, he has a right and duty to retain the film as evidence, pending disposition of the specific charge which he has brought."
>
> * * *

> "However, we feel that we are bound by the opinion of the Supreme Court in Books. See also Marcus, et al v. Search Warrants of Property, 367 U.S. 717 (1961). The lesson of Books is that law enforcement officers cannot seize allegedly obscene publications without a prior adversary proceeding on the issue of obscenity. Such a seizure violates the First Amendment to the Constitution of the United States, and is a prior restraint condemned by the Supreme Court. In light of Burstyn, supra, Kingsley Pictures, supra and Jacobellis, supra, these rules apply to motion pictures as well. Allegedly obscene publications or movies are not to be treated the same way as narcotics, gambling paraphernalia and other contraband. The legal rules governing the former are different from the latter. A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 211-212 (1964). This analysis requires this Court to hold unconstitutional the seizure of the film 'I, A Woman' since there must be an adversary proceeding on the issue of obscenity before a movie can be constitutionally seized."

In *Evergreen Review, Inc. v. Kahn,* 230 F.Supp. 498 (D.C. Eastern Dist. N.Y. 1964), a three-judge court held that the issuance of a search warrant authorizing a police officer to seize an allegedly obscene and pornographic magazine, without an adversary proceeding, violated free speech and press provisions of the First and Fourteenth Amendments.

See *United States v. Brown,* 274 F.Supp. 561 (D.C. N.Y. 1967), holding search and seizure of allegedly obscene material to be invalid because of failure to conduct a preliminary adversary hearing, and refusing to uphold a search and seizure as "incident to a lawful arrest."

See *Cambist Films, Inc. v. State of Illinois,* 292 F. Supp. 185 (U.S. District Court, N.D. Illinois, E.D., Oc-

tober 12, 1968), wherein the facts were as follows: Prior to seizure and arrest, the State's Attorney, a Magistrate, a State Circuit Judge and Defendant viewed a film; subsequently, a criminal complaint was executed and Defendant was arrested under warrant and the one film was seized under warrant; Defendant filed, as Plaintiff, a federal civil rights petition, asking for declaratory, injunctive and other equitable relief. Holding that the informal gathering of the Defendant, State's Attorney and Judges was not enough to amount to the strict requirement of a "Prior-Adversary-Judicial Determination"; said the Court:

> "The seizure of the film and the related criminal prosecution were undertaken in clear violation of the First Amendment of the Constitution of the United States. It is well established that prior to suppression by law enforcement officials of allegedly obscene material there must be an adversary hearing on the question of obscenity. The law demands this procedural safeguard to ensure against the prior restraint and suppression of constitutionally protected expression. A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 211-22 (1964); Metzger v. Pearcy, 393 Fed.2d 202 (7th Cir. 1968). Defendants [the police and district attorney], contend that the constitutional requirement of an adversary hearing was satisfied in this case by virtue of the informal gathering of the prosecuting authorities, a local Magistrate and a County Circuit Judge in the Princess Theatre, which took place before the film was seized. But there is no due process, constitutional or otherwise, in such a gathering. A judge is not discharging the duties of his office or conducting court when he attends a movie theatre as a paying patron. More important, by definition, the heart of an adversary proceeding before suppression of a medium of expression may be effected, is the opportunity for adversary presenta-

> tion to ensure that expression will not be suppressed without contest and justification. The absence of a formal adversary proceeding is therefore in fact and in law constitutionally critical. Our freedoms survive and thrive through institutions and procedures such as the adversary hearing required in this case."

292 F.2d at 187-188.

In *Carroll v. President and Commissioners of Princess Anne,* 89 S.Ct. 347 (1968), the United States Supreme Court again reiterated definitely and clearly the requirement of a "prior-adversary-judicial-determination" before free press and speech can be suppressed:

> "The Court has emphasized that a system or prior restraints comes to this Court bearing a heavy presumption against its constitutional validity. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963); Freedman v. State of Maryland, 380 U.S. 51, 57, 85 S.Ct. 734, 13 L.Ed. 2d 649 (1965). And even where this presumption has been overcome, the Court has insisted upon careful procedural provisions, designed to assure the fullest presentation and consideration of the matter which the circumstances permit. As the Court said in Freedman v. Maryland, supra, at 58, 85 S.Ct., at 739, a noncriminal process. . . .
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> * * *
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> ". . . Marcus v. Search Warrant, 367 U.S. 717, 731, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961); A Quantity of Books v. State of Kansas, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809 (1964). In the latter case, this Court disapproved a seizure of books under Kansas statute on the basis of ex parte scrutiny by a judge. The Court held that the Statute was unconstitutional. Mr. Justice Brennan, speaking for a plur-

> ality of the Court, condemned the Statute for 'not first affording [the seller of the books] an adversary hearing.' 378 U.S. at 211, 84 S.Ct., at 1726. . . ."

89 S.Ct. at 351-352.

For further authorities holding that it is unlawful and unconstitutional to seize any press material, with or without warrants, before first holding a prior-adversary-hearing, see: *Drive-In Theatres, Inc. v. Husky,* 305 F.Supp. 1232 (W.D.N.C., 1969); *Delta Book Distributors, Inc. v. Cronvich,* 304 F.Supp. 662 (E.D. La. 1969); *Morrison v. Wilson,* 307 F.Supp. 196, No. P-Civ-2110 (N.D. Fla., filed December 8, 1969); *May v. Harper,* 306 F.Supp. 1222, No. P-Civ-2145 (N.D. Fla., November 28, 1969); *City News Center, Inc. v. Carson,* 298 F.Supp. 706 (M.D. Fla., 1969); *Flack v. Municipal Ct. for Anaheim-Fullerton Judicial Dist.,* 429 P.2d 192 (1967) (en banc); *HMH Publishing Co. v. Oldham,* 306 F.Supp. 495, No. 69-20-Civ-Oc (M.D. Fla., filed October 15, 1969); *Tobin v. Rizzo,* No. 69-1195 (E.D. Pa., filed November 24, 1969); *Pennsylvania v. Guild Theatre, Inc.,* 248 A.2d 45 (1968); *Cambist Films, Inc. v. Tribell,* 293 F.Supp. 407 (E.D. Ky., 1968); *Goodwin, et al v. Morris, et al,* No. C 70-19, and *Searfoss v. Morris,* No. C 70-20 (not yet reported, U.S.D.C. N.D. Ohio, Western Div., Three-Judge Court (March 18, 1970); *Thevis, et al v. Moore,* C.A. No. 69-562, U.S.D.C. N.D. Alabama, Southern Div. (April 22, 1970); *Morrison and Peachtree News Co., Inc. v. Wilson, et al,* 307 F.Supp. 196; and *Fontaine v. Dial,* 303 F.Supp. 436 (W.D. Texas, August 5, 1969—Three-Judge Court).

Furthermore, Section 9, Article 527 is further unconstitutionally vague in that it sets forth the following words:

> "Where possible and practical, obscene matter upon which prosecution are based under the provisions of this Article, should be obtained by police officer prosecuting attorneys without resorting to seizure of such matter pursuant to a search warrant."

Obviously the words "possible and practical" imply a vague, uncertain, and indefinite standard, and are themselves a license for the individual discretion of police officers to decide what is "possible" and what is "practical," and thereby resort to a seizure without a warrant. In actuality those words, "possible and practical," give to the individual police officer unfettered discretion and authority to decide for himself whether to seize pursuant to a warrant, if he thinks it possible or practical, or to seize on the spot, without a warrant. Such conduct is expressly forbidden and unconstitutional. Section 9, Article 527 then has the following words:

> "Where seizure of alleged obscene matter is necessary and practical, a search warrant to search for and seize such matter is expressly authorized."

Again the words "necessary and practical" are uncertain, indefinite, and vague, and give to the arresting police officer unfettered authority to act in an unconstitutional manner by deciding for himself what is "necessary and practical" and make an arrest and seizure which would be unconstitutional. See, also in Section 9 the following:

> "Where practical, the matter alleged to be obscene shall be attached to the complaint to afford the issuing Magistrate the opportunity to examine such materials to assist him in deciding whether the warrant shall issue."

Again the entire Section 9 of Article 527 is ridden with indefinite and vague terms allowing for individual police officers to decide what is "practical" or "necessary" in obtaining search warrants, without first getting a prior-adversary-hearing. Such broad and unfettered discretion permitted police officers was specifically held to be unconstitutional.

Section 9, Article 527, is in its entirety an unconstitutional search warrant procedure, and specifically sets forth unconstitutional procedures for gaining search warrants.

CONCLUSION

Petitioners herein respectfully submit that this case is unique in that this is the first case to be presented to this Honorable Court in which the Petitioners have completely exhausted their state remedies by proceeding in the State Courts from the outset of this case rather than seek any type of federal action. The proceedings in this case started in a state court and went on direct appeal to the highest court of that state, such court being the Supreme Court of the State of Texas, where final judgment was rendered. Thus, this case is in line with the holdings of this Court which are to the effect that before seeking any type of federal relief the person should exhaust his state remedies and once having done so, this Court can then note probable jurisdiction provided substantial federal questions are involved. Similar federal questions, in some instances, were presented to this Court in the following cases: *Younger v. Harris, Dyson v. Stein, Byrne v. Karalexis, Boyle v. Landry,* and *Samuels v. MacKell,* all such cases having opinions rendered by this

Honorable Court on February 23, 1971, with the basic holding being that in absence of a showing of irreparable harm through the application of a statute, the defendant should exhaust his state remedies before proceeding in any type of federal courts, and the instant case conforms to that ruling.

It is respectfully submitted that the statute in question, Vernon's Ann.P.C. article 527, as amended, is unconstitutional as written and as applied because it fails to differentiate between public and mere private possession of allegedly obscene materials, thus causing a prior restraint on First Amendment freedoms. The said statute is also void for vagueness and impermissible overbreadth in the area of First Amendment freedoms because the said provision is susceptible of sweeping and improper application by law enforcement officials and has a chilling and inhibiting effect on the exercise of federal constitutional rights of citizens of the State of Texas and of the United States to disseminate and receive First Amendment materials. It is also void for vagueness and impermissible overbreadth in that there are no standards for guidelines set forth in the statute which due process demands to assure non-obscene materials the constitutional protection to which they are entitled for citizens to possess, distribute, acquire, sell, receive and/or purchase First Amendment materials. The said statute is unconstitutional in that it imposes strict liability in the guilty knowledge element without requiring that the Defendant know the material to be obscene and that he intends to violate the law. It is unconstitutional in that it fails to define proper procedural safeguards to protect freedom of speech and press pursuant to the First, Fourth, Fifth and Fourteenth Amendments of the United States Constitution.

The manner of handling the case by the Texas Supreme Court in itself presents a federal question.

For the foregoing reasons, it is respectfully requested that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

MEL S. FRIEDMAN
MALEY AND FRIEDMAN
Houston Bar Center Building
723 Main Street
Suite 410
Houston, Texas 77002

STANLEY FLEISHMAN
6922 Hollywood Boulevard
Suite 718
Hollywood, California 90028

Counsel for Petitioners

APPENDIX "A"

NO. 87,174-C

In The
89TH DISTRICT COURT
OF
WICHITA COUNTY, TEXAS

STATE OF TEXAS

VS.

STEVE SCOTT AND CINNE ARTS THEATRE, INC.

JUDGMENT

On this the 9th day of February, 1970, came on to be heard Plaintiff's Application for Temporary Injunction, and Defendants' Motion to Dismiss this lawsuit and to declare the Texas Obscenity Statute, Article 527, unconstitutional and void, and after having considered the pleadings, legal briefs, and evidence, all presented to the Court, the Court is of the opinion that the Plaintiff's Application for Temporary Injunction should be denied, and further the Court is of the opinion that the said Statute is unconstitutional, and it is, therefore,

ORDERED, ADJUDGED AND DECREED that Plaintiff's Application for Temporary Injunction is in all things denied.

It is further, ORDERED, ADJUDGED AND DECREED that Sections 3, 1-E, 9, 1-F, and 13, of Article 527 as amended, of the Texas Penal Code, are unconstitutional, null and void, and are ordered held for

naught, and this Court so declares said Sections of the said Article to be unconstitutional, void and held for naught. The said Sections of Article 527 are unconstitutional for the reasons set forth in this Court's Fndings of Facts and Conclusions of Law, filed herein.

Furthermore, it is accordingly ORDERED AND DECREED that the State of Texas, by and through its law enforcement agencies herein Wichita County, Texas, and in and all subdivisions thereof, are permanently enjoined from any further law enforcement of Article 527, as amended of the Texas Penal Code, for the reason that said Article has been and is declared unconstitutional.

It is further ORDERED, ADJUDGED AND DECREED that since Article 527, as amended, of the Texas Penal Code is hereby declared unconstitutional, it is accordingly ORDERED AND DECREED that both Plaintiff's Application for Temporary Injunction and Permanent Injunction are denied, and Plaintiff's lawsuit is hereby dismissed with prejudice.

To which action and ruling of the Court as well as to the Findings of Fact and Conclusions of Law filed by the Court, Plaintiff then and there in open court excepted respectively and he then and there in open court gave notice of appeal to the Supreme Court of the State of Texas.

SIGNED AND ENTERED this the 16th day of February, 1970.

/s/ TEMPLE DRIVER
Judge Presiding

Approved as to Form:

/s/ MEL S. FRIEDMAN
Mel S. Friedman
Attorney for Defendants
410 Houston Bar Center
723 Main Street
Houston, Texas 77002
228-6491

/s/ TIMOTHY EYSSEN
Timothy Eyssen
Attorney for The State of Texas
County Attorney of
Wichita County, Texas

I, Wayne Wiggins of the District Courts in and for Wichita County, Texas, do hereby certify that the above and foregoing to be a true and correct copy of the JUDGMENT in said case as the same appears from the original now on file in my office.

Given under my hand and the seal of said Courts, at Wichita Falls, Texas, this 16th day of February A.D., 1970.

WAYNE WIGGINS,
Clerk District Courts of
Wichita County, Texas

By /s/ CARRIE L. KEY, Deputy

APPENDIX "B"

Findings of Fact and Conclusions of Law, Hon. Temple Driver, Judge of District Court, Wichita County, Texas.

Filed for Record at 3:52 o'clock P.M. Feb. 9, 1970.

State of Texas vs. Steve Scott and Cinne Arts Theatre, Inc. No. 87,174-C.

In the 89th District Court of Wichita County, Texas.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

I.

This lawsuit was originally initiated and brought by The State of Texas through the County Attorney's Office of Wichita County, Texas, in the above-styled and numbered cause, pursuant to Article 527, as amended, of the Penal Code of the State of Texas, seeking an injunction and destruction of alleged obscene press materials.

II.

Among numerous motions filed by Defendants, a Motion to Dismiss this Lawsuit and Motion to Declare the Texas Obscenity Statute, Article 527, Unconstitutional and Void, was filed before the hearing, the evidentiary hearing for temporary injunction. Said motion was filed on January 26, 1970, and set for hearing on oral argument for February 9, 1970, at 9:00 a.m.; and further, both parties were ordered to submit legal briefs on the constitutional questions presented in the said motions.

III.

After having considered legal briefs submitted by both parties and oral argument regarding the Motion to Dismiss this lawsuit and Motion to Declare Texas Obscenity Statute, Article 527, Unconstitutional and Void, the Court is of the opinion that the said statute is unconstitutional for the following reasons, and in the following Sections:

A. Section 3, of Article 527, as amended, is unconstitutional, in that it is over broad, and fails to differentiate between public and mere private distribution, and fails further to differentiate between public and mere private possession of alleged obscene materials, all in violation of the following cases. Stanley v. Georgia, 89 S.Ct. 1243; Stein v. Batchelor, 300 Fed. Sup. 602 (United States District Court for the Northern District of Texas), Dallas Division, Judges Goldberg, Circuit Judge, and Hughes and Woodward, District Judges, presiding; Karalexis v. Byrne, Civil Action 69-665-J (three judge court United District Court for District of Massachusetts); and United States of America v. 37 Photographs; United States District Court for the Central District of California (three judge court—Civil Action 69-2242-F), wherein the Federal Customs Law, 19 USC 1305 was struck down as unconstitutionally overbroad.

B. Section 1-E of Article 527, as amended, of the Texas Penal Code, is unconstitutionally overbroad in that in its definition of "distribute" it also fails to differentiate between public and mere private distribution, in violation of the cases set out above.

C. Section 9 of Article 527, as amended, of the Texas Penal Code, is unconstitutional in that it specifically sets

forth an ex parte search warrant provision in violation of the following cases: Marcus v. Search Warrants, 367 U.S. 718; A Quantity of Copies of Books v. Kansas, 378 U.S. 205; Fontaine v. Dial, 303 Fed. Sup. 436 (three judge court of the United States District Court for the Western District of Texas) Tyron, Inc. v. Wilkenson, 410 Fed. 2d 639; and numerous other cases, all requiring a prior-adversary determination of the obscene nature of the press materials involved, before any search, seizure, arrest or any other criminal process can be instituted against press materials.

D. Section 1, Subsection F, of Article 527, as amended, of the Texas Penal Code is unconstitutionally vague and overbroad in setting forth the constitutionally required scienter element of knowledge by constructively imposing knowledge through a use of vague and indefinite terms so as to amount to absolute and strict liability in violation of the following cases: Smith v. California, 361 U.S. 157; New York Times Co., et al v. Sullivan, 376 U.S. 254; Noto v. U.S., 367 U.S. 290; Hartzel v. U.S., 322 U.S. 680; Baumgartner v. U.S., 322 U.S. 665; Schneiderman v. U.S., 320 U.S. 118; all holding that absolute and strict liability in the knowledge element in any prosecution seeking to restrain freedom of speech violates the constitutional protections of the First Amendment to the United States Constitution.

E. Section 13, of Article 527, as amended, of the Texas Penal Code is unconstitutional in that it fails to define proper procedural safeguards to protect freedoms of speech and press of the First Amendment to the United States Constitution when the State seeks to restrain freedom of press by the use of the injunction remedy set

out in this section of the statute, all in violation of Freedman v. Maryland, 380 U.S. 51; as more specifically applied in Grove Press, Inc. v. City of Philadelphia, 418 Fed.2d 82; in that the injunction section, Section 13, fails to set forth proper procedural guidlines in order that freedom of the press would not suffer unconstitutional suppression under this section of the statute. It fails to set forth, for example (a) the procedural guidelines for issuing temporary and permanent injunctions; (b) it fails to set forth proper guidelines as to the date and time of defendant's answer, the type of evidence to be used and produced at such a hearing, and more specifically, it fails to set forth the burden of proof before an injunction should issue restraining freedom of the press. Further, this section fails to provide for adequate notice to a defendant to be able to answer and defend allegations raised in a petition for injunction, in that it sets forth a trial setting which could be within one day after joinder of issue; this particular section fails to comply with the full scope of the "prior-adversary proceeding" which is constitutionally required by the above stated cases.

For all the above reasons stated, this Court specifically finds that those sections here-above stated are unconstitutional and violate defendant's rights under the First and Fourteenth Amendments to the United States Constitution of freedom of speech and press and this Court hereby and herein orders, adjudges and declares the above and foregoing sections of Article 527, as amended, of the Texas Penal Code unconstitutionl, void and held for naught.

IV.

The State of Texas has herein timely given notice of appeal and this Court recognizes under Rule 499 A of the Texas Rules of Civil Procedure, that such appeal would be a direct appeal to the Supreme Court of Texas; this case will be directly referred to the Texas Supreme Court for further adjudication on the constitutional questions presented herein and the judgment of this Court.

The State of Texas, by and through its law enforcement agencies herein Wichita County are permanently enjoined from any further law enforcement of Article 527, as amended, of the Texas Penal Code.

Signed and Entered this 9th day of February, 1970.

/s/ TEMPLE DRIVER
Temple Driver, Judge Presiding

APPENDIX "C"

PENAL CODE FOR THE STATE OF TEXAS VERNON'S ANNOTATED PENAL CODE ARTICLE 527, AS AMENDED

Art. 527. Obscene articles

Definitions

Section 1. As used in this Article:

(A) "Obscene" material means material (a) the dominant theme of which, taken as a whole, appeals to a prurient interest; (b) which is patently offensive because it affronts contemporary community standards relating to the description or representtation of sexual matters; and (c) which is utterly without redeeming social value.

(B) "Prurient interest" means a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for a specially susceptible audience, the appeal of the subject matter shall be judged with reference to such audience.

(C) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription, or mechanical, chemical or electrical reproduction, or any other articles, equipment, machines or materials.

(D) "Person" means any individual, partnership, firm, association, corporation or other legal entity, or any agent or servant thereof.

(E) "Distribute" means to transfer possession of, whether with or without consideration.

(F) "Knowingly" means having actual or constructive knowledge of the subject matter. A person shall be deemed to have constructive knowledge of the contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.

Affirmative Defense

Sec. 2. It is not innocent but calculated purveyance which is prohibited. This article shall not apply to persons who may possess or distribute obscene matter or participate in conduct otherwise prescribed by this article when such possession, distribution, or conduct occurs in the course of law enforcement activities or in the course of bona fide scientific, educational, or comparable research or study, or like circumstances of justification where the possession, distribution, or conduct is not related to the subject matter's appeal to prurient interest.

General Sale or Distribution, etc.,
of Obscene Matter: Penalty

Sec. 3. Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares for distribution, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to

distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.

Distribution to Minors; Law Governing

Sec. 4. Notwithstanding any of the provisions of this bill, the distribution of obsecne matter to minors shall be governed by Senate Bill 661 enacted by the 61st Legislature and approved by the Governor. In case of any conflict between the provisions of this bill and said Senate Bill 661, the provisions of the latter shall prevail.

Hiring, Employing, etc., Minor to Engage In Acts Described in Section 3: Penalty

Sec. 5. Every person who, with knowledge that a person is a minor under 18 years of age, or who, while in possession of such facts that he should reasonably know that such person is a minor under 18 years of age, hires, employs, or uses such minor to do or assist in doing any of the acts described in Section 3, is guilty of a misdemeanor.

Conspiracy

Sec. 6. A conspiracy of two or more persons to commit any of the crimes prescribed by this Act is punishable as a felony. Any court having jurisdiction of the conspiracy crime has concurrent jurisdiction to try all misdemeanor crimes committed in furtherance of the conspiracy.

Special Verdict

Sec. 7. The jury, or the court, if a jury trial is waived, shall render a general verdict, and must also render a special verdict as to whether the matter named in the

charge is obscene. The special verdict or findings on the issue of obscenity may be: "We find the _____ (title or description of matter) to be obscene," or "We find the _____(title or description of matter) not to be obscene," as they may find each item is or is not obscene. A special verdict shall not be admissible as evidence in any other proceeding. nor shall it be res judicata of any question in any other proceeding.

Punishment for Violation of Sections 3, 5 and 6

Sec. 8. (A) Every person who violates Section 3 is punishable by a fine of not more than $1,000 plus $5 for each additional unit of material coming within the provisions of this Act, which is involved in the offense, not to exceed $10,000, or by confinement in the county jail for not more than six months plus one day for each additional unit of material coming within the provisions of this chapter, and which is involved in the offense, such basic maximum and additional days not to exceed 360 days in the county jail, or by both fine and confinement. If such person has previously been convicted of a violation of this Act, a violation of Section 3 is punishable as a felony and by a fine of not more than $2,000 plus $5 for each additional unit of material coming within the provisions of this Act, which is involved in the offense, not to exceed $25,000, or by imprisonment in the penitentiary for not exceeding five years or both fine and imprisonment.

(B) Every person who violates Section 5 is punishable by a fine of not more than $2,000 or by confinement in the county jail for not more than one year, or by both fine and confinement. If such person has been previously

convicted of a violation of this Act, a violation of Section 5 is punishable as a felony and by a fine of not more than $5,000, or by imprisonment in the penitentiary not exceeding five years, or both fine and imprisonment.

(C) Every person who violates Section 6 is punishable by a fine of not more than $5,000, or by imprisonment in the penitentiary not exceeding five years, or by both such fine and imprisonment.

Seizure of Obscene Matter Authorized

Sec. 9. Where possible and practical, obscene matter upon which prosecutions are based under the provisions of this article, should be obtained by peace officers or prosecuting attorneys without resorting to seizure of such matter pursuant to a search warrant. Where seizure of alleged obscene matter is necessary and practical, a search warrant to search for and seize such matter is expressly authorized. Moreover, no peace officer shall seize any obscene matter from the possession of any person except under the authority of a search warrant issued under the provisions of the Code of Criminal Procedure of Texas. Where practical, the matter alleged to be obscene shall be attached to the complaint to afford the issuing magistrate the opportunity to examine such materials to assist him in deciding whether the warrant shall issue. Where the alleged obscene matter is not available to present to the magistrate, the affiant or affiants to the complaint shall describe the alleged obscene materials in detail so as to assist the magistrate in deciding whether the warrant should issue. Moreover, where alleged obscene matter is not attached to the complaint, as in the case of motion pictures or statutes, the magistrate to whom the complaint is presented shall, where practical, personally view the

matter alleged to be obscene before issuing the warrant. Where a search warrant is issued under the provisions of this section, only that matter described in the complaint shall be seized by the executing peace officer or officers. Nothing contained in this section shall prevent the obtaining of alleged obscene matter under injunction proceedings as authorized by this Act or by any other statute of the State of Texas.

Destruction of Matter or Advertisement Upon Conviction of Accused

Sec. 10. Upon the conviction of the accused, the court may, when the conviction becomes final, order any matter or advertisement, in respect whereof the accused stands convicted, and which remains in the possession or under the control of the district attorney or any law enforcement agency, to be destroyed, and the court may cause to be destroyed any such material in its possession or under its control.

Preparing, etc., Obscene Matter or Advertising Elsewhere for Sale or Distribution in this State: Extradition

Sec. 11. Every person, whether or not he is a citizen of or present in this state, who knowingly prepares, publishes, or prints obscene matter for sale or distribution in this state, or who knowingly sends or causes to be sent into this state for sale or distribution any obscene matter or any advertising promoting the sale or distribution of obscene matter, shall be subject to the penalties of this Act, and the executive authority of this state shall demand extradition of such person from the executive authority of the State in which such person is found.

Policy (local regulation)

Sec. 12. No city, county or other political subdivision may enact any regulation of obscene material which conflicts with the provisions of this Act; however, a city, county or other political subdivision is authorized to regulate further the means and manner of distribution and exhibition of matter.

Enforcement by Injunction, etc.

Sec. 13. The district courts of this state and the judges thereof shall have full power, authority, and jurisdiction, upon application by any district or county attorney within their respective jurisdictions, or the attorney general to issue any and all proper restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out and enforce the provisions of this article. Such restraining orders or injunctions may issue to prevent any person from violating any of the provisions of this article. However, no restraining order or injunction shall issue except upon notice to the person sought to be enjoined. Such person shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial. In the event that a final order or judgment of injunction be entered against the person sought to be enjoined, such final order or judgment shall contain a provision directing the person to surrender to the sheriff of the county in which the action was brought any obscene matter in his possession and such sheriff shall be directed to seize and destroy such matter.

Amended by Acts 1955, 54th Leg., p. 386, ch. 107, §1; Acts 1957, 55th Leg., p. 425, ch. 203, §1; Acts 1961, 57th Leg., p. 1041, ch. 461, §1, eff. June 10, 1969.

APPENDIX "D"

IN THE

Supreme Court of Texas

NO. B-2006

STATE OF TEXAS,

Petitioner,

v.

STEVE SCOTT AND CINNE ARTS THEATRE, INC.,

Respondents.

DIRECT APPEAL FROM WICHITA COUNTY

The record in this case presents such a strange melange of unauthorized and inconsistent pleadings and orders that it has been difficult to determine what issues were properly before the trial court for decision and are now properly before this court for review.

This case was begun on January 20, 1970, as a simple action by the State of Texas for injunctive relief against the Cinne Arts Theatre, Inc. and its manager, Steve Scott. The suit grew out of the showing by the defendants of seven movies alleged to be obscene, and was filed pursuant to authority contained in Section 13, Article 527, Penal Code of Texas. The relief sought was (1) a temporary restraining order directing that the pictures not be altered

in any way or be removed from the county, but be presented to the judge for viewing (2) a temporary injunction and (3) a permanent injunction against exhibiting obscene matter or possessing such matter for exhibition. The court entered an order setting a hearing on the petition for a temporary injunction for January 22 at 9 a.m. and directing that the motion pictures not be altered or removed from the county and be produced for viewing by the judge. In addition, a subpoena duces tecum was issued for Scott directing him to appear at 9 a.m. on the 22nd and to bring the motion picture films with him together with a projector suitable for showing them.

Counsel for defendants filed a series of pleadings denominated "motions," far too numerous to describe or even to catalogue, many of which are unauthorized by our rules of civil procedure and are unknown to our procedural law. One of the pleadings became the basis for the trial court's judgment. It should be analyzed.

The pleading is denominated "MOTION TO DISMISS THIS LAWSUIT AND MOTION TO DECLARE THE TEXAS OBSCENITY STATUTE, ARTICLE, 527, UNCONSTITUTIONAL AND VOID." In this so-called "motion," defendants asked the court to (1) dismiss the State's suit, (2) declare the Texas obscenity law unconstitutional, and (3) ". . . in the alternative, if this Court should not declare said Statute unconstitutional, that this Court stay any further proceedings and issue no further order and that this entire record be finalized and certified to the Texas Supreme Court for the purpose of deciding the constitutional questions presented in this motion and for declaring the said Texas obscenity law unconstitutional. . . ." The reasons given in the motion for declaring

the statute unconstitutional are substantially the same as those hereafter shown to have been adopted by the trial judge.

Although the trial court's judgment recites that on February 9 a hearing was held on the State's application for temporary injunction and on defendants' motion to dismiss and to declare Article 527 of the Penal Code unconstitutional, the record before us indicates that the court simply sustained the defendants' motion without hearing evidence on the State's application. In its judgment, the court (1) denied the State's application for a temporary injunction; (2) denied the State's application for a permanent injunction; (3) dismissed the State's suit with prejudice and (4) permanently enjoined the State and its law enforcement agencies in Wichita County and all of its subdivisions from enforcing Article 527. In addition, the court in its judgment *declared*[1] Sections 1(E), 1(F), 3, 9 and 13 of Article 527 to be unconstitutional and void. The sections thus declared to be unconstitutional and void read:

> "Section 1. As used in this Article:
>
> ". . . .
>
> "(E) 'Distribute' means to transfer possession of, whether with or without consideration.
>
> "(F) 'Knowingly' means having actual or constructive knowledge of the subject matter. A person shall be deemed to have constructive knowledge of the contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.
>
> ". . . .

1. Emphasis ours throughout.

"Sec. 3. Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares for distribution, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.

". . . .

"Sec. 9. Where possible and practical, obscene matter upon which prosecutions are based under the provisions of this article, should be obtained by peace officers or prosecuting attorneys without resorting to seizure of such matter pursuant to a search warrant. Where seizure of alleged obscene matter is necessary and practical, a search warrant to search for and seize such matter is expressly authorized. Moreover, no peace officer shall seize any obscene matter from the possession of any person except under the authority of a search warrant issued under the provisions of the Code of Criminal Procedure of Texas. Where practical, the matter alleged to be obscene shall be attached to the complaint to afford the issuing magistrate the opportunity to examine such materials to assist him in deciding whether the warrant shall issue. Where the alleged obscene matter is not available to present to the magistrate, the affiant or affiants to the complaint shall describe the alleged obscene materials in detail so as to assist the magistrate in deciding whether the warrant should issue. Moreover, where alleged obscene matter is not attached to the complaint, as in the case of motion pictures or statues, the magistrate to whom the complaint is presented shall, where practical, personally view the matter alleged to be obscene before issuing the warrant. Where a search warrant is issued under the provisions of this section, only that matter described in the complaint shall be seized by the ex-

ecuting peace officer or officers. Nothing contained in this section shall prevent the obtaining of alleged obscene matter under injunction proceedings as authorized by this Act or by any other statute of the State of Texas.

". . . .

"Sec. 13. The district courts of this state and the judges thereof shall have full power, authority, and jurisdiction, upon application by any district or county attorney within their respective jurisdictions, or the attorney general to issue any and all proper restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out and enforce the provisions of this article. Such restraining orders or injunctions may issue to prevent any person from violating any of the provisions of this article. However, no restraining order or injunction shall issue except upon notice to the person sought to be enjoined. Such person shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial. In the event that a final order or judgment of injunction be entered against the person sought to be enjoined, such final order or judgment shall contain a provision directing the person to surrender to the sheriff of the county in which the action was brought any obscene matter in his possession and such sheriff shall be directed to seize and destroy such matter."

The court also filed Findings of Facts and Conclusions of Law in which Sections 1(E), 1(F), 3, 9 and 13 were *adjudged and declared* to be unconstitutional and void. Section 1(E) was declared to be unconstitutional because it is "overbroad in that in its definition of *'distribute'* it also fails to differentiate between public and mere private *distribution.* . . ." Section 1(F) was declared to be "un-

constitutionally vague and overbroad in setting forth the constitutionally required scienter element of knowledge *by constructively imposing knowledge* through a use of vague and indefinite terms so as to amount to absolute and strict liability. . . ." Section 3 was declared to be unconstitutional because "it is over broad, and fails to differentiate between public and mere private *distribution,* and fails further to differentiate between public and mere private possession of alleged obscene materials. . . ." Section 9 was declared to be "unconstitutional in that it specifically sets forth *an ex parte search warrant provision* . . . [without] requiring a prior-adversary-determination of the obscene nature of the press materials involved, before any search, seizure, arrest or any other criminal process can be instituted against press materials." Section 13 was declared unconstitutional "in that it fails to define proper safeguards to protect freedoms of speech and press . . . [in that] it fails to set forth . . . (a) the procedural guidelines for issuing temporary and permanent injunctions; (b) it fails to set forth proper guidelines as to the date and time of defendants' answer, the type of evidence to be used and produced at such a hearing, and more specifically it fails to set forth the burden of proof before an injunction should issue restraining freedom of the press . . . [and] it fails to provide for adequate notice to a defendant to be able to answer and defend allegations raised in a petition for injunction, in that it sets forth a trial setting which could be within one day after joinder of issue. . . ."

In this direct appeal, prosecuted pursuant to Rule 499-a, Texas Rules of Civil Procedure, the State by proper points of error challenges the various phases of the trial court's judgment as well as its several declarations

of unconstitutionality. We sustain all of the points, albeit for reasons differing generally from those given by the State, and reverse the trial court's judgment.

Unless defendants' "motion" is considered to be a cross-action for declaratory judgment as authorized by Article 2524-1, Vernon's Tex. Civ. Stats.—and no one has suggested it may be—, there is no provision in our statutes or rules of civil procedure authorizing the type of pleading filed by defendants and made the basis of the trial court's judgment. Under our rules of procedure unconstitutionality of a statute upon which a suit is based is as to the defendant a defensive and not an offensive weapon to be used in a motion to dismiss. Rule 12(b) of the Federal Rules of Civil Procedure provides that a defendant may by motion present a defense based on "failure to state a claim upon which relief can be granted." In spite of the fact that the Federal rules were in existence when the Texas rules were adopted and many of such rules were adopted verbatim, Rule 12(b) has no counterpart in the Texas Rules of Civil Procedure.

Rule 45, Texas Rules of Civil Procedure, requires that pleadings in the district and county courts "[b]e by petition and answer" and that the answer consist of a statement in plain and concise language of "the defendant's grounds of defense." Rules 83-98 authorize pleading of every conceivable defense in an answer, including unconstitutionality of a statute on which suit may be based. Moreover, permitting the question of unconstitutionality to be raised at the temporary injunction hearing by mere motion short-circuits the right of a plaintiff to have a separate hearing on the right to a permanent injunction. See *Houston Belt & T. Ry. Co. v. Texas &*

New Orleans R. Co., 289 S.W.2d 217 (Tex. Sup. 1956). No reason is disclosed in the record for abandoning orderly rules of procedure. Nevertheless, the trial court treated the motion as an answer to the State's petition, at least to the extent of denying the State's prayer for a temporary injunction, and we will also do so.

The trial court's holding that Sections 1(E) and 1(F) of Article 527 are unconstitutional is clearly erroneous. These sections are mere definitions of words or terms used in the statute. They neither regulate conduct, prescribe duties, define offenses nor impose penalties. We know of no provision in the constitution of this State or of the Constitution of the United States limiting the power of the State Legislature to define the words and terms "distribute" and "knowingly" as used in Article 527. Whether the definitions render other sections of the statute unconstitutional is another matter.

The fact that the provisions of Sections 3 and 9 may be subject to the deficiencies charged to them by defendants and found by the trial court is no reason for declaring those sections unconstitutional and void in toto or as to persons and situations to which the deficiencies are inapplicable. 16 AM. JUR.2d 427, *Constitutional Law* §194; *McKinney v. Blankenship*, 282 S.W.2d 691 (Tex. Sup. 1955); *Ex parte Usener*, 391 S.W.2d 735 (Tex. Crim. 1965). Only a person charged with *distribution* of obscene materials *with constructive knowledge* of their obscene character may question the validity of Section 3 on the grounds set out in defendants' motion and incorporated in the trial court's findings and conclusions. See *Oil Well Drilling Co. v. Associated Indemnity Corp.*, 264 S.W.2d 697, 699 (Tex. Sup. 1954). The defendants

in this case were not so charged. The State's suit charged only that "Steve Scott *exhibited* to the public for an admission fee in the Cinne Arts Theatre, a motion picture, to wit: 'What Ever Happened to Stud Flame' and six other films" which pictures were alleged to be obscene materials as defined in Article 527. The injunction sought was to prohibit defendants from "*exhibiting* or *having in his/their possession with intent to exhibit* any obscene matter." The record does not disclose that the defendants had only *constructive knowledge* of the nature, content and character of the films they were showing.

Neither were defendants in position to question the validity of Section 9 on the ground that it authorizes issuance of a search warrant for seizure of materials without a prior adversary hearing. No search warrant or other writ for seizure of the films was issued in this case. If the subpoena duces tecum for production of the films was improperly issued, that fact does not invalidate Section 9 and does not authorize defendants to attack its validity on a ground not relevant to their case. To hold that Sections 3 and 9 would be unconstitutional and void if an effort were made to apply them in situations and as to persons differing from those in this case would be to give an advisory opinion which our courts are not at liberty to give. See *United Services Ins. Co. v. Delaney,* 396 S.W.2d 855 (Tex. Sup. 1965); *Morrow v. Corbin,* 122 Tex. 553, 62 S.W.2d 641 (1933).

The only remaining reason for the trial court's judgment denying the State's prayer for a temporary injunction is unconstitutionality of Section 13. As heretofore indicated that section was held unconstitutional because it fails to provide for adequate notice and proper procedural guidelines.

The leading case in this area is *Freedman v. Maryland,* 380 U.S. 51 (1965), which involved a criminal prosecution for violation of a state statute which made it unlawful to exhibit a motion picture without first obtaining a license. The Supreme Court held the statute unconstitutional because: (1) Upon the censor's refusal to grant a license an exhibitor had to assume the burden of instituting judicial proceedings and persuading a court that the film was protected expression; (2) once the censor had acted against a film, exhibition was prohibited pending judicial review and (3) no assurance of prompt judicial determination was afforded. The court further stated:

> "The teaching of our case is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." 300 U.S. 51, at 58.

The court in *Freedman* recommended the kind of injunction procedure upheld in *Kingsley Books, Inc. v. Brown,* 354 U.S. 436 (1957), a type very similar to that provided by Section 13. This type of procedure was again recommended in *A Quantity of Copies of Books v. Kansas,* 378 U.S. 205, 210 (1965). In *Fontaine v. Dial,* 303 F. Supp. 436 (W.D. Tex. 1969), Section 13 was specifically suggested as a possible procedure for the State to utilize to enforce its public policy against the display of obscene movies. Clearly, the court in that case was of the opinion that Section 13 is constitutional. Section 13 was also considered and sustained as constitutional by the court in *Newman v. Conover,* 313 F. Supp. 623 (N.D. Tex. 1970).

Under Section 13 no restraining order or injunction may be issued without notice to the persons to be enjoined. Trial on the issues may be had, if a defendant wishes, within one day after answer, and a decision must be reached by the court within two days after conclusion of the trial determining the issue of obscenity. Section 13, read in light of the other sections of Article 527, such as those defining obscenity, is not vague. The prevailing constitutional standards place the burden of proof in an adversary proceeding on the obscenity issue on the State, as does Article 527. As the three-judge court in *United States v. 37 Photographs*, ____F. Supp.____ (C.D. Cal. 1970), stated:

> "Any system of censorship must contain, at the minimum, the following procedural safeguards, if it is not to contravene the First and Fifth Amendments, (1) any restraint prior to judicial determination can be imposed only briefly, and (2) the censor in a specified brief period will go to court. The safeguards must be contained in the statute or by judicial ru[illegible] "

Thus read, we hold Section 13 of Article 527 constitutional.[2]

Finally, the State asserts that the trial court erred in enjoining the State of Texas, by and through all of its law enforcement agencies in Wichita County, from enforcing Article 527. This point raises questions as to whether all persons enjoined were proper parties to the

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2. Since this case was tried in the trial court, a three-judge Federal Court has considered the constitutionality of Sections 1(F), 3, 9 and 13 of Art. 527. See Newman v. Conover, 313 F.Supp. 623 (N.D. Tex. 1970). The court held Sections 1(F), 3 and 13 constitutional, but held Section 9 unconstitutional. We agree with the holding that Sections 1(F) and 13 are constitutional. We reserve judgment as to constitutionality of Sections 3 and 9.

lawsuit and whether an injunction could be granted in the absence of any pleading requesting one. We sustain the point.

The only suggestion by the defendants, which we have found in the record, that they were entitled to injunctive relief is contained in a pleading denominated "MOTION TO DISMISS BECAUSE OF THE GRANT OF IMMUNITY." In this pleading defendants pointed out that, on motion of the State, the district judge had granted them immunity from criminal prosecution, and they urged that "such immunity implies that Defendants are free from being abused by a 'quazi-criminal' [sic] proceeding sheltered under a disguised civil title named 'injunction'." They prayed that "this cause" be permanently enjoined from bringing any criminal prosecution against them, "and further that the State of Texas be enjoined from bringing any type of 'quazi-criminal' [sic] or civil action to punish these defendants as it would infringe and encroach upon Defendants' freedoms granted under Defendants' grant of immunity." A grant of immunity from criminal prosecution does not insulate a violator of Article 527 against injunctive relief.

The judgment of the trial court is reversed, the injunction against the State is dissolved, the State's suit is reinstated on the docket of the trial court and that court is directed to proceed to trial of such suit in accordance with this opinion.

ROBERT W. CALVERT
Chief Justice

OPINION DELIVERED: November 11, 1970

Concurring opinion by Associate Justice McGee.

APPENDIX "E"

CLERK'S OFFICE - SUPREME COURT

Austin, Texas, Dec. 16, 1970

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of STATE v. SCOTT ET AL., No. B-2006 was this day overruled.

Very truly yours,

GARSON R. JACKSON, Clerk

APPENDIX "F"

CONSTITUTION OF THE UNITED STATES
AMENDMENTS TO THE CONSTITUTION

[Amendment I]

[Freedom of Religion, of Speech, and of the Press]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

[Amendment IV]

[Searches and Seizures]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[Amendment V]

[Rights of Accused in Criminal Proceedings]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in

any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[Amendment XIV]

Section 1.

[Citizenship Rights Not to be Abridged by States]

* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PENAL CODE FOR THE STATE OF TEXAS

VERNON'S ANNOTATED PENAL CODE ARTICLE 527, AS AMENDED

Art. 527. Obscene articles

Definitions

Section 1. As used in this Article:

(A) "Obscene" material means material (a) the dominant theme of which, taken as a whole, appeals to a prurient interest; (b) which is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) which is utterly without redeeming social value.

(B) "Prurient interest" means a shameful or morbid interest in nudity, sex, or excretion, which goes sub-

stantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for a specially susceptible audience, the appeal of the subject matter shall be judged with reference to such audience.

(C) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription, or mechanical, chemical or electrical reproduction, or any other articles, equipment, machines or materials.

(D) "Person" means any individual, partnership, firm, association, corporation or other legal entity, or any agent or servant thereof.

(E) "Distribute" means to transfer possession of, whether with or without consideration.

(F) "Knowingly" means having actual or constructive knowledge of the subject matter. A person shall be deemed to have constructive knowledge of the contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.

Affirmative Defense

Sec. 2. It is not innocent but calculated purveyance which is prohibited. This article shall not apply to persons who may possess or distribute obscene matter or participate in conduct otherwise prescribed by this article when such possession, distribution, or conduct occurs

in the course of law enforcement activities or in the course of bona fide scientific, educational, or comparable research or study, or like circumstances of justification where the possession, distribution, or conduct is not related to the subject matter's appeal to prurient interest.

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Sec. 4. Notwithstanding any of the provisions of this bill, the distribution of obscene matter to minors shall be governed by Senate Bill 661 enacted by the 61st Legislature and approved by the Governor. In case of any conflict between the provisions of this bill and said Senate Bill 661, the provisions of the latter shall prevail.

Hiring, Employing, etc., Minor to Engage
In Acts Described in Section 3: Penalty

Sec. 5. Every person who, with knowledge that a person is a minor under 18 years of age, or who, while in possession of such facts that he should reasonably know that such person is a minor under 18 years of age, hires, employs, or uses such minor to do or assist in doing any of the acts described in Section 3, is guilty of a misdemeanor.

Conspiracy

Sec. 6. A conspiracy of two or more persons to commit any of the crimes prescribed by this Act is punishable as a felony. Any court having jurisdiction of the conspiracy crime has concurrent jurisdiction to try all misdemeanor crimes committed in furtherance of the conspiracy.

Special Verdict

Sec. 7. The jury, or the court, if a jury trial is waived, shall render a general verdict, and must also render a special verdict as to whether the matter named in the charge is obscene. The special verdict or findings on the issue of obscenity may be: "We find the _____ (title or description of matter) to be obscene," or "We find the _____ (title or description of matter) not to be obscene," as they may find each item is or is not obscene. A special verdict shall not be admissible as evidence in any other proceeding, nor shall it be res judicata of any question in any other proceeding.

Punishment for Violation of Sections 3, 5 and 6

Sec. 8. (A) Every person who violates Section 3 is punishable by a fine of not more than $1,000 plus $5 for each additional unit of material coming within the provisions of this Act, which is involved in the offense, not to exceed $10,000, or by confinement in the county jail for not more than six months plus one day for each additional unit of material coming within the provisions of this chapter, and which is involved in the offense, such basic maximum and additional days not to exceed 360 days in the county jail, or by both fine and confinement. If such person has previously been convicted of a vio-

lation of this Act, a violation of Section 3 is punishable as a felony and by a fine of not more than $2,000 plus $5 for each additional unit of material coming within the provisions of this Act, which is involved in the offense, not to exceed $25,000, or by imprisonment in the penitentiary for not exceeding five years or both fine and imprisonment.

(B) Every person who violates Section 5 is punishable by a fine of not more than $2,000 or by confinement in the county jail for not more than one year, or by both fine and confinement. If such person has been previously convicted of a violation of this Act, a violation of Section 5 is punishable as a felony and by a fine of not more than $5,000, or by imprisonment in the penitentiary not exceeding five years, or both fine and imprisonment.

(C) Every person who violates Section 6 is punishable by a fine of not more than $5,000, or by imprisonment in the penitentiary not exceeding five years, or by both such fine and imprisonment.

Seizure of Obscene Matter Authorized

Sec. 9. Where possible and practical, obscene matter upon which prosecutions are based under the provisions of this article, should be obtained by peace officers or prosecuting attorneys without resorting to seizure of such matter pursuant to a search warrant. Where seizure of alleged obscene matter is necessary and practical, a search warrant to search for and seize such matter is expressly authorized. Moreover, no peace officer shall seize any obscene matter from the possession of any person except under the authority of a search warrant issued under

the provisions of the Code of Criminal Procedure of Texas. Where practical, the matter alleged to be obscene shall be attached to the complaint to afford the issuing magistrate the opportunity to examine such materials to assist him in deciding whether the warrant shall issue. Where the alleged obscene matter is not available to present to the magistrate, the affiant or affiants to the complaint shall describe the alleged obscene materials in detail so as to assist the magistrate in deciding whether the warrant should issue. Moreover, where alleged obscene matter is not attached to the complaint, as in the case of motion pictures or statutes, the magistrate to whom the complaint is presented shall, where practical, personally view the matter alleged to be obscene before issuing the warrant. Where a search warrant is issued under the provisions of this section, only that matter described in the complaint shall be seized by the executing peace officer or officers. Nothing contained in this section shall prevent the obtaining of alleged obscene matter under injunction proceedings as authorized by this Act or by any other statute of the State of Texas.

Destruction of Matter or Advertisement Upon Conviction of Accused

Sec. 10. Upon the conviction of the accused, the court may, when the conviction becomes final, order any matter or advertisement, in respect whereof the accused stands convicted, and which remains in the possession or under the control of the district attorney or any law enforcement agency, to be destroyed, and the court may cause to be destroyed any such material in its possession or under its control.

Preparing, etc., Obscene Matter or Advertising Elsewhere for Sale or Distribution in this State: Extradition

Sec. 11. Every person, whether or not he is a citizen of or present in this state, who knowingly prepares, publishes, or prints obscene matter for sale or distribution in this state, or who knowingly sends or causes to be sent into this state for sale or distribution any obscene matter or any advertising promoting the sale or distribution of obscene matter, shall be subject to the penalties of this Act, and the executive authority of this state shall demand extradition of such person from the executive authority of the State in which such person is found.

Policy (local regulation)

Sec. 12. No city, county or other political subdivision may enact any regulation of obscene material which conflicts with the provisions of this Act; however, a city, county or other political subdivision is authorized to regulate further the means and manner of distribution and exhibition of matter.

Enforcement by Injunction, etc.

Sec. 13. The district courts of this state and the judges thereof shall have full power, authority, and jurisdiction, upon application by any district or county attorney within their respective jurisdictions, or the attorney general to issue any and all proper restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out and enforce the provisions of this article. Such restraining orders or injunctions may issue to prevent any person from violating any of the

provisions of this article. However, no restraining order or injunction shall issue except upon notice to the person sought to be enjoined. Such person shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial. In the event that a final order or judgment of injunction be entered against the person sought to be enjoined, such final order or judgment shall contain a provision directing the person to surrender to the sheriff of the county in which the action was brought any obscene matter in his possession and such sheriff shall be directed to seize and destroy such matter.

Amended by Acts 1955, 54th Leg., p. 386, ch. 107, §1; Acts 1957, 55th Leg., p. 425, ch. 203, §1; Acts 1961, 57th Leg., p. 1041, ch. 461, §1, eff. June 10, 1969.